No. 2183

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent.

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant, Cross-Libelant and Cross-Appellant.

SUPPLEMENTAL
APOSTLES ON APPEAL

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Lowman & Hanford Co., Seattle

Records of U. S. Circuit
Court of Appeals
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In the District Court of the United States for the Western District of Washington, Northern Division.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
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THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent.

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Appellant and Cross-Libelant.

No. 4484.

NAMES AND ADDRESSES OF COUNSEL.

IRA BRONSON, Esq.,
614 Colman Building, Seattle, Washington,
Proctor for Cross-Appellant, Cross-Libelant and Claimant.

WM. H. BOGLE, Esq.,
610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

CARROLL B. GRAVES, Esq.,
610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

F. T. MERRITT, Esq.,
610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

L. BOGLE, Esq.,
610 Central Building, Seattle, Washington,
Proctor for Libelant and Appellee.

In the United States District Court for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent.

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Libelant.

No. 4484.

PETITION FOR APPEAL.

To the Honorable Judge of said Court:

International Steamship Company, a corporation, claimant and cross-libelant herein, respectfully shows, that on or about the 6th day of January, 1911, the Kitsap County Transportation Company, a corporation, exhibited its libel in the District Court of the United States, for the Western District of Washington, Northern Division, sitting at Seattle, against the Steamship "Indianapolis," her engines, boilers, tackle, apparel and furniture, in an action civil and maritime, for damages for collision between the steamer "Kitsap," owned by said libelant, and the said steamship "Indianapolis," owned by International Steamship Company, a corporation, claimant and cross-libelant herein, and praying among other things for the relief set forth in said libel that said steamship "Indianapolis" be condemned to pay the demand of said libelant and the costs in said libel mentioned.

That process issued out of said court having been served on said steamship "Indianapolis," the said International Steam-

ship Company, as owner and claimant did thereafter file its answer to the said libel in the said District Court, and also file its cross-libel against the said steamer "Kitsap," owned by the said Kitsap County Transportation Company, in which answer and cross-libel said claimant and cross-libelant prayed that the said original libel be dismissed with costs, and that the said steamer "Kitsap," her engines, boilers, tackle, apparel and furniture, be condemned to pay the demands of said cross-libelant and the costs upon said cross-libel, as by reference to said libel, answer and cross-libel will more fully appear.

That the said cause came on to be heard before the said Honorable C. H. Hanford, one of the Judges of said District Court, on or about the 8th day of November, 1911, upon the pleadings and proof taken in said cause by the respective parties. And the said Judge on or about the 28th day of May, 1912, made and filed a memorandum decision on the merits on said cause whereby it was, among other things, found and decreed that the collision mentioned in the pleadings resulted from the mutual fault of said steamer "Kitsap" owned by the said libelant, and the steamship "Indianapolis" owned by the said cross-libelant, and that there should be a division of damages resulting from said collision, and that the damages sustained by said steamship "Kitsap" resulting from said collision amounted to the total sum of Thirty-two Thousand Six Hundred Sixty-six and 87/100 ($32,666.87) Dollars, and that the damages to said "Indianapolis" resulting from said collision amounted to the total sum of Five Thousand Four Hundred Fifty-one and 50/100 ($5,451.50) Dollars, and that on a division of said damages, the said claimant and cross-libelant should pay to said libelant the sum of Thirteen Thousand Six Hundred Seven and 68/100 ($13,607.68) Dollars, but that neither party to said action should be entitled to recover costs therein, and no interest should be allowed either party.

And it was further found by said Court that the said libel-

ant as a part of said damage was entitled to damages in the nature of demurrage for a period of one hundred thirty-nine (139) days consumed in making temporary and permanent repairs to said steamer "Kitsap" as a result of said collision, said damages in the nature of demurrage being fixed at the rate of Fifty Dollars ($50.00) per day.

And after the making and filing of said memorandum decision, and before the entry of final judgment in said cause, the said C. H. Hanford having resigned as one of the Judges of the above entitled Court. Thereafter and on the 15th day of August, 1912, a final decree in said cause was made and entered by the Honorable E. E. Cushman, one of the Judges of said Court, in accordance with said memorandum decision.

And this appellant is advised and insists that said decree is erroneous, inasmuch as the said collision did not result from the mutual fault of said steamer "Kitsap" and the said steamer "Indianapolis," but did result from the sole fault of said steamer "Kitsap"; and also inasmuch as the said court refused to award to the claimant and cross-libelant the full amount of the damage sustained by the claimant and cross-libelant for all of the injuries, damage and loss resulting from said collision to the said steamship "Indianapolis," and also for the reason that said court found and decreed that this petitioner should pay one-half of the damage found to have been sustained by said steamer "Kitsap" as a result of said collision; and also refused to allow your petitioner its costs in said cause, but decreed that neither party should recover costs herein.

And this appellant for this and other reasons appeals from the whole of said decree to the United States Circuit Court of Appeals to be held in the city of San Francisco, California, for the Ninth Circuit, and prays that the said decree may be modified and corrected and that this cross-libelant may have a decree against said Kitsap County Transportation Company, a corporation, libelant, for the full amount of the damage sustained by said cross-libelant and resulting from said collision, or such other decree made as to the said United States Circuit Court

of Appeals may seem just, and that the said Kitsap County Transportation Company, a corporation, be ordered to pay to the cross-libelant its costs and damages in the premises.

IRA BRONSON,
Proctor for Claimant, Cross-Libelant and Cross-Appellant.

Due service of the foregoing petition for appeal is hereby admitted this 25th day of September, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.

Indorsed: Petition for Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent,

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Libelant.

No. 4484.

ORDER ALLOWING APPEAL.

This cause having come on to be heard on this 26th day of September, 1912, upon the petition of International Steamship Company, a corporation, cross-libelant in the above entitled

cause for an appeal from the decree of this court made and entered on the 15th day of August, 1912, wherein and whereby it was decreed that the collision mentioned in the pleadings herein resulted from the mutual fault of the Steamer "Kitsap" and the Steamship "Indianapolis," and that the damage resulting therefrom should be divided, and upon such division decreeing that the said Kitsap County Transportation Company should have and recover from the said claimant and cross-libelant and the stipulators upon the release bond given herein, the sum of Thirteen Thousand Six Hundred Seven and 68/100 ($13,607.68) Dollars, and that neither party should recover costs in this action; and it appearing from such petition for an appeal that the said decree has been duly filed with the Clerk of this Court, and the Court being duly advised in the premises;

IT IS HEREBY ORDERED AND DECREED that the said International Steamship Company be, and hereby is, allowed an appeal from said decree as aforesaid, and that the appeal bond to be given on said appeal be fixed at the sum of Two Hundred and Fifty Dollars.

EDWARD E. CUSHMAN,
United States District Judge.

O. K. Bogle, Graves, Merrit & Bogle, Proctors for Libelant.

Indorsed: Order Allowing Appeal. Filed in the U. S. District Court Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
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vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent,

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Libelant.

No. 4484.

NOTICE OF APPEAL.

To Kitsap County Transportation Company, a Corporation, Libelant; and to Bogle, Graves, Merritt & Bogle, Proctors for Libelant; and to Frank L. Crosby, Clerk of said Court:

You, and each of you, will please take notice that the International Steamship Company, a corporation, claimant and cross-libelant herein, hereby appeals from the final decree made and entered herein on the 15th day of August, 1912, in favor of the libelant and against this claimant and cross-libelant, and the stipulators for the release of the steamship "Indianapolis," for the sum of Thirteen Thousand Six Hundred Seven and 68/100 ($13,607.68) Dollars, without costs, and from each and every part of said decree, to the next United States Circuit Court of Appeals, for the Ninth Circuit, to be holden in and for said Circuit at the city of San Francisco, State of California.

Dated at Seattle, Washington, September 25th, 1912.

IRA BRONSON,
Proctor for Claimant and Cross-Libelant.

Due service of the foregoing notice of appeal, after the filing of the same in the office of the Clerk of the above entitled Court, is hereby admitted by the Proctors for Libelant this 25th day of September, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.

Indorsed: Notice of Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent,

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Libelant,

No. 4484.

BOND ON APPEAL.

Know All Men by these Presents:

That we, INTERNATIONAL STEAMSHIP COMPANY, a corporation, claimant and cross-libelant, as principal, and Joshua Green of Seattle, Washington, and Frank E. Burns of Seattle, Washington, as sureties, are held and firmly bound unto the Kitsap County Transportation Company, a corporation, in the sum of Two Hundred and Fifty ($250.00) Dollars,

lawful money of the United States to be paid to said KITSAP COUNTY TRANSPORTATION COMPANY, a corporation, to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, by these presents.

Sealed with our seals and dated at Seattle this 25th day of September, 1912.

WHEREAS, the said International Steamship Company, a corporation, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in the above entitled cause on the 15th day of August, 1912, and having duly filed its assignment of errors in the office of the Clerk of said Court, and having filed its petition for such appeal which was duly allowed by said Court, and a citation was duly issued in said cause on such appeal.

NOW, THEREFORE, the condition of this obligation is such that if the above named International Steamship Company, a corporation, cross-appellant in said cause, shall prosecute said appeal with effect and pay all costs that may be awarded against it as such cross-appellant if the appeal is not sustained, and shall abide by, fulfill and perform whatever judgment and decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, in this cause, or on the mandate of said Court by the Court below, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

INTERNATIONAL STEAMSHIP COMPANY.
By Joshua Green, President.
C. H. J. Stoltenberg, Secretary.

JOSHUA GREEN,
FRANK E. BURNS.

Sealed and delivered, and taken and acknowledged this 25th day of September, 1912, before me.

(Seal) ROBERT W. REID,
Notary Public in and for the State of Washington,
residing at Seattle.

United States of America,
State of Washington,
County of King—ss.

JOSHUA GREEN and FRANK E. BURNS, being duly sworn, each for himself and not one for the other, deposes and says: That he resides in the Western District of Washington; that he is worth the sum of Five Hundred ($500.00) Dollars over and above all his just debts and liabilities, and exclusive of property exempt from execution.

JOSHUA GREEN,
FRANK E. BURNS,

Sworn to this 25th day of September, 1912, before me.

(Seal) ROBERT W. REID,
Notary Public in and for the State of Washington,
residing at Seattle.

The foregoing bond approved as to form, amount and sufficiency of sureties.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Kitsap County Transportation Company,
Appellant and Appellee.

Indorsed: Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent,

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Libelant.

No. 4484.

ASSIGNMENT OF ERRORS ON BEHALF OF CROSS-LIBELANT AND RESPONDENT.

Comes now the above named International Steamship Company, a corporation, cross-libelant and respondent in the above entitled cause, and says that in the record and proceeding in said cause, and in the decree made and entered therein on the 15th day of August, 1912, there are manifest errors in the following particulars:

I.

That the Court erred in finding and decreeing that the collision mentioned in the pleadings between the Steamer "Kitsap" and the Steamship "Indianapolis" resulted from the mutual fault of said Steamer "Kitsap" and said Steamship "Indianapolis," and in refusing to find and decree that said collision resulted from the sole fault and negligence of the said Steamer "Kitsap."

II.

That the Court erred in finding and decreeing in said cause that the damage resulting from the collision mentioned in the

pleadings therein, should be divided, and that the libelant should recover one-half of the damage sustained by it and resulting from said collision; and that the cross-libelant and respondent should pay to the libelant one-half of the damages to said Steamer "Kitsap" found to have resulted from said collision, and in refusing to award to the cross-libelant and respondent all of the damages resulting to the Steamship "Indianapolis" from said collision.

III.

That the Court erred in allowing to the libelant in any event any part of the sum of Twelve thousand seven hundred twelve and 20/100 ($12,712.20) dollars for the salving of the Steamer "Kitsap."

IV.

That the Court erred in not awarding to the cross-libelant and respondent the full damages sustained by the cross-libelant and respondent for all of the injuries, demurrage and loss resulting from said collision to said Steamship "Indianapolis."

Wherefore, the cross-libelant and respondent prays that said decree may be reversed, modified and corrected in the matters and things above set forth, and that such decree may be entered herein as shall meet with the approval of this Honorable Court and as shall do justice between the parties herein.

IRA BRONSON,
Proctor for Cross-Libelant and Respondent,
International Steamship Company.

Due service of the foregoing Assignment of Errors is hereby admitted this 25th day of September, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctor for Libelant.

Indorsed: Assignment of Errors on Behalf of Cross-Libelant and Respondent. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26. 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

KITSAP COUNTY TRANSPORTATION CO., *Libelant,* vs. STEAMSHIP "INDIANAPOLIS," etc., *Respondent,* INTERNATIONAL S. S. CO., *Claimant.*	No. 4484.

PRAECIPE.

To the Clerk of the Above Entitled Court:

You will please prepare Supplemental Apostles on Appeal which shall contain the following records:

Cross-Appellant's Notice of Appeal.
Bond on Appeal.
Petition for Appeal.
Order Allowing Appeal.
Citation on Appeal.
Assignment of Errors.

IRA BRONSON,
Proctor for Cross-Appellant.

Indorsed: Praecipe. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy.

In the District Court of the United States for the Western District of Washington. Northern Division.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent,

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Appellant and Cross- Libelant.

No. 4484.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing 16 printed pages, numbered from 1 to 16, inclusive, to be a full, true and correct copy of the record and proceedings in the above and foregoing entitled cause, as is called for by praecipe of Proctor for Claimant, Cross-Appellant and Cross-Libelant, as the same remain of record and on file in the office of the Clerk of said Court, and that the same, constitutes the Supplemental Apostles on Appeal from the order, judgment and decree of the District Court of the United States for the Western District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit at San Francisco, California.

I further certify that I hereto attach and herewith transmit the original Citation issued in this cause.

I further certify that the cost of preparing and certifying the foregoing Supplemental Apostles on Appeal is the sum of $22.20, and that the said sum has been paid to me by Ira Bronson, Esq., Proctor for Cross-Appellant, Cross-Libelant and Claimant.

In testimony whereof I have hereunto set my hand and affixed my official seal, at Seattle, in said District, this 9th day of October, 1912.

Seal

FRANK L. CROSBY, Clerk.

In the United States District Court, for the Western District of Washington, Northern Division.—In Admiralty.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,
Libelant,

vs.

THE STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent,

INTERNATIONAL STEAMSHIP COMPANY, a Corporation,
Claimant and Cross-Libelant,

No. 4484.

CITATION ON APPEAL.

The President of the United States to Kitsap County Transportation Company, a corporation, Libelant; and to Bogle, Graves, Merritt & Bogle, its Proctors herein, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, California, within thirty

days of the date hereof, pursuant to an appeal to the said Court duly filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the International Steamship Company, a corporation, is cross-appellant and you are cross-appellee, then and there to show cause, if any there be, why the decree of the District Court of the United States for the Western District of Washington, Northern Division, in the above entitled cause, dated August 15th, 1912, should not be reversed or corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Edward E. Cushman, Judge of the District Court of the United States for the Western District of Washington, Northern Division, at the City of Seattle, Washington, this 26th day of September, 1912.

EDWARD E. CUSHMAN,
Judge of the United States District Court for the Western District of Washington.

Due service of the within citation after the filing of the same, in the office of the Clerk of the above entitled Court is hereby admitted this 25th day of September, 1912.

BOGLE, GRAVES, MERRITT & BOGLE,
Proctors for Libelant.

Indorsed: No. 4484. In the District Court of the United States for the Western District of Washington, Northern Division. Kitsap County Transportation Company, a corporation, Libelant, vs. The Steamship "Indianapolis," etc., Respondent. Citation on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Sept. 26, 1912. Frank L. Crosby, Clerk. By F. A. Simpkins, Deputy. Ira Bronson, Proctor for Claimant and Cross-Libelant, 614-618 Colman Building, Seattle.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation,
Appellant and Cross-Appellee,

vs.

STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture,
Respondent and Appellee,

INTERNATIONAL STEAMSHIP COMPANY, a corporation,
Claimant and Cross-Appellant.

No. 2183.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant and Cross-Appellee

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant and Cross-Appellee.
SEATTLE, WASHINGTON

In the
United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation, *Appellant and Cross-Appellee,* *vs.* STEAMSHIP "INDIANAPOLIS," her engines, boilers, tackle, apparel and furniture, *Respondent and Appellee,* INTERNATIONAL STEAMSHIP COMPANY, a corporation, *Claimant and Cross-Appellant.*	No. 2183.

APPEAL FROM THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Appellant and Cross-Appellee

STATEMENT OF THE CASE.

This cause comes here on appeal by the Libelant below, and upon a cross-appeal by Claimant below, from a judgment rendered in the court below, in favor of Appellant and Cross-Appellee and against

Appellee and Cross-Appellant in a suit in admiralty for the recovery of damages caused by a collision between the Steamships "Kitsap" and "Indianapolis," in Elliott Bay, off the Seattle docks on December 14, 1910.

The libel (Record pp. 4-8) alleges that the Libelant was and is a Washington corporation and the owner of the Steamship "Kitsap" at the time of the collision, which vessel was used and employed in transporting passengers and freight between the City of Seattle, Washington, and other ports and places upon the waters of Puget Sound and its tributaries; that the Steamship "Kitsap" was a wooden vessel of the following registered tonnage: 195 gross tons, and 123 net tons; that she was 127.5 feet in length over all, had a beam of 22 feet and a depth of 7.5 feet, and that she was at the time of the collision stout, staunch and in all respects well manned, tackled, appareled and appointed, and had the usual and necessary complement of officers and men. That the Steamship "Indianapolis" was an iron or steel American vessel of about 180 feet in length, and was engaged in transporting freight and passengers between the City of Seattle, Washington, and the City of Tacoma, Washington.

That on Wednesday, December 14, 1910, at about 4:35 P. M., the "Kitsap" left her berth on the south side of Pier 4 in Seattle, on her regular voyage or run from Seattle to Liberty Bay; that a dense fog hung over Elliott Bay and the course of the steamer therein; that she backed from her berth at a point about opposite Pier 5, and then went ahead under slow bell, with helm hard astarboard, turning to her course to Four Mile Rock; her master was at her wheel in the pilot house, and her mate was on the bridge; a competent man was on the lookout, and they, as well as the rest of the crew, who were variously employed in their respective duties, were faithfully attending thereto.

That the vessel proceeded under slow bell, regularly sounding her fog signals, up to the time of the collision, and every precaution was being taken to avoid a collision during said time. Shortly after turning to her course, the fog signals of the "Indianapolis" were heard a little forward of the "Kitsap's" beam on the port side; that the "Indianapolis" was then inbound from Tacoma to the Colman Dock in Seattle; that the "Kitsap" after the "Indianapolis'" fog signals were heard on the "Kitsap," was a considerable distance northerly

from the proper and regular course of the "Indianapolis" from the bell-buoy off Duwamish Head to Colman Dock. That the "Kitsap" proceeded on her course at a speed of not over three or four miles an hour, regularly sounding her fog whistles, and all hands keeping a sharp lookout, and taking every precaution against collision, until it appeared that the "Indianapolis" was getting closer, when the engines of the "Kitsap" were stopped and alarm signals immediately sounded; that under these circumstances and conditions the "Indianapolis" suddenly appeared through the fog a short distance from the "Kitsap" and on her port side, coming at a high rate of speed and heading for the port side of the "Kitsap."

The libel also alleges that the master of the "Kitsap" at once ordered his engine full speed astern, which checked all forward movement of the "Kitsap," but that before she could gather sternway, the "Indianapolis," without changing her course or checking her speed to any apparent extent, struck the "Kitsap" on the port side just back of the pilot house, cutting into the hull of the "Kitsap" several feet; that the "Indianapolis" backed away from the "Kitsap," and then put her bow against

the "Kitsap" just forward of the cut, and all the passengers and crew of the "Kitsap" were transferred to the "Indianapolis," and that shortly thereafter the "Kitsap" sank by reason of the injuries received in such collision, and became and is a total loss.

The libel also alleges that the collision was in no way due to any fault on the part of the "Kitsap," which was carefully operated, nor of her officers or crew, but was due wholly to the fault of the "Indianapolis," in that she was navigated at too great speed in the fog, close to the docks in the crowded harbor, where it was known to those in charge of the "Indianapolis" that vessels were leaving the docks at all times; also in that she did not give proper heed to the fog signals of the "Kitsap," and that she did not go under the stern of the "Kitsap," as under the collision rules she should have done; and also in that she did not stop and reverse her engines in time, as she should have done, and in that she was in other respects improperly and carelessly navigated.

The libel alleges the damages to the "Kitsap" in the sum of Fifty Thousand Dollars ($50,000.00).

Upon the filing of the libel on January 6, 1911, a monition and attachment was duly issued out of the said court and delivered to the United States Marshal, who thereafter seized the "Indianapolis" and made due return of the writ.

The International Steamship Company, Appellee and Cross-Appellant herein, duly appeared and filed its claim as owner of the "Indianapolis," and procured her release upon bond. Thereafter, Claimant filed an answer to the libel (Record pp. 14-16), which is practically a denial, either positive or on information and belief, of the allegations of the libel, except as to the ownership and size of the "Kitsap," the size of the "Indianapolis," and the fact that the vessels were in collision in a heavy fog at the time and place alleged.

The Appellee, as the owner of the "Indianapolis," also filed a cross-libel against the "Kitsap" (Record pp. 9-11), in which it is alleged that Cross-Appellant was and is an Oregon corporation, and the owner of the "Indianapolis," which vessel was used and employed in transporting passengers and freight between Seattle and Tacoma, Washington; that the "Indianapolis" at the time of the collision was stout, staunch and in all respects well manned,

tackled, appareled and appointed, and had the usual and necessary complement of officers and men; that the "Kitsap" is an American vessel regularly engaged in transporting passengers and freight between Seattle and other ports on Puget Sound.

The cross-libel further alleges that on December 14, 1910, the "Indianapolis" left her berth at Tacoma at 3 o'clock P. M. on her regular trip to Seattle, running in clear weather until near Duwamish buoy; that near that locality the "Indianapolis" sighted a slight fog, whereupon she reduced her speed, increasing it momentarily as the fog lifted, but almost immediately reducing it upon sighting a second fog bank ahead; that said steamer entered the fog bank under a slow bell, and regularly sounding her fog signals as required by law; that her master was at her wheel, her mate upon the bridge, and a competent man was upon the lookout, and that each and all were faithfully attending to their respective duties at all of said times. That soon after entering the second fog bank the master of the "Indianapolis" heard the whistles of the "Kitsap" at a distance off the port bow, and that shortly after, he heard the whistles nearly ahead but still a considerable distance away, whereupon

he caused the engines of the "Indianapolis" to be stopped. That subsequently he heard the "Kitsap's" whistles to starboard, upon which he ordered half speed astern, and upon again hearing her whistle and apparently growing nearer ordered full speed astern. That almost immediately, sighting the "Kitsap" through the fog, the master of the "Indianapolis" blew alarm whistles and used all reasonable methods to avoid collision, notwithstanding which a collision took place, resulting in injury to the "Indianapolis" and in the sinking of the "Kitsap."

The cross-libel alleges that the collision and resulting damage was in nowise due to the fault of the "Indianapolis," which was carefully and prudently managed, and upon her usual and proper course to her dock, nor to any fault of her officers or crew, but that it was wholly due to the fault of the "Kitsap" in that she was navigating at too great speed in the fog; in that she did not give proper heed to the signals of the "Indianapolis," and more particularly in that, although those in charge of the "Kitsap" knew that the "Indianapolis" was coming up to her dock in a dense fog, the "Kitsap" was navigated upon a course which would twice

carry her between the "Indianapolis" and said dock, that is, it should twice take the "Kitsap" across the bows of the "Indianapolis."

The damage to the "Indianapolis" is alleged at the sum of Fifty Thousand Dollars ($50,000.00).

The Libelant answered the cross-libel (Record pp. 12 and 13), denying any knowledge or information of the allegations as to the actions of the "Indianapolis," denying the allegations of care on the part of the "Indianapolis" and of negligence on the part of the "Kitsap," as well as the damage alleged to have been sustained by the "Indianapolis."

The cause was duly referred by the District Court to a Commissioner to take and report the testimony therein; and all evidence in the cause on behalf of both parties was taken before the Commissioner, and on October 20, 1911, returned by him to the court, together with the exhibits offered. (Record p. 431).

The case was argued before Honorable C. H. Hanford, Judge of the District Court for the Western District of Washington, on November 8, 1911, upon the evidence taken before the Commissioner

and the exhibits offered. Said Judge thereafter, and on May 28, 1912, filed a memorandum decision (Record pp. 432-434), in which he found among other things, as follows: That the "Kitsap" left her dock at 4:35 P. M., backing away from the south side of Pier 4, under a slow bell, sufficient to clear the face of the docks, then reversed and went ahead *curving to starboard, until she came around on her regular course* headed for Four Mile Rock on the north shore of the harbor. That the "Indianapolis" was a much larger vessel than the "Kitsap," with a steel hull, and that at 4:33 P. M. she was coming from Tacoma and near the bell-buoy off Duwamish Head on the west side of Seattle harbor, and was running at reduced speed, but that she then increased to full speed, which was fifteen knots per hour or approximately fifteen hundred feet per minute. That from the time the "Kitsap" started both vessels were giving fog signals by blasts of their whistles at intervals of from ten to twenty seconds. That the time of the collision was 4:40 P. M. The Court found the point of collision to be opposite the slip between the Grand Trunk and Colman Docks, about 1500 feet from the end of the docks, and about 10,500 feet from Duwamish Head,

and that it required seven minutes for the "Indianapolis" to run this distance from Duwamish Head to the point of collision at her maximum speed.

The Court also found that no attempt was made on either vessel to avoid the collision by operating the helm to change her course so that when the vessels came together they were on converging lines—the "Kitsap" headed obliquely across the bow of the "Indianapolis." That the "Indianapolis" rammed the "Kitsap" on her port side in the vicinity of her pilot house, and cut into her hull to a depth of about seven feet. The Court also found as a fact, that at the moment of the impact, both vessels were moving ahead with considerable momentum, and rejected as untrue all evidence to the contrary, and found that both vessels were at fault. The Court found the damage to the "Kitsap", from the uncontradicted evidence, to be a total of $32,666.87, including demurrage for the "Kitsap" during the time repairs were being made. The Court found the damage to the "Indianapolis," including demurrage, at a total of $5,451.50, making a grand total of $38,118.37, which the Court found

should be divided, and that neither party should recover costs.

Thereafter, and on August 15, 1912, a final decree in accordance with such memorandum decision was signed and filed, the same being signed by Honorable Edward E. Cushman, Judge of said court, Judge Hanford having resigned as Judge of said court prior to the entry of a final decree in the case.

This Appellant took this appeal from the final judgment on August 15, which appeal was duly perfected, and the Apostles on Appeal prepared, certified and printed. On September 25, 1912, Claimant and Cross-Libelant also appealed from the final decree. This cause comes here upon the appeal of the Libelant and the cross--appeal of the Claimant from such final decree.

The testimony in this case is voluminous, and the decision on this appeal will depend largely on the conclusion this Court reaches from this evidence, as to the fault causing the collision in question, and our argument will therefore, consist principally of a discussion of the evidence. We will not at this time point out the evidence we rely

upon for a reversal of the decree of the lower court, but will try to make a statement of the material, admitted or undisputed facts in the case, and our claim as to the proven facts in dispute, to aid the court in understanding the issues to be determined. In our argument, we will refer to the evidence we claim sustains our position in the case, and which we rely upon in asking this Court for a larger decree against the Appellee.

The steamer "Kitsap" is a wooden vessel of 195 gross tons and 123 net tons. She was 127.5 feet in length over all, and had a beam of 22 feet, and a depth of 7.5 feet (R. p. 5), and she weighed about from 125 to 150 tons (R. pp. 69 and 393). She was owned by the Kitsap County Transportation Company, a corporation, Libelant herein.

The steamer "Indianapolis" is a steel vessel (R. p. 415) of about 180 feet in length, 30 feet in breadth, and 8 feet mean draft, (her depth not appearing), and weighing about 493 tons (R. pp. 369, 393, 403). She was owned by the International Steamship Company, Appellee and Cross-Appellant herein. The "Indianapolis' 'at the time in question, was running regularly between Seattle and Tacoma, and the "Kitsap" was running between

Seattle and Paulsbo on Liberty Bay, an arm of Puget Sound. Both vessels had regular berths at docks in Seattle, the berth of the "Indianapolis" being at the outer face of the Colman Dock, and the berth of the "Kitsap" just before leaving on the voyage in question, being on the south side of Pier 4. The distance between these two piers is about 700 feet (Libelant's Exhibit J).

The regular course of the "Kitsap" from her berth at Pier 4 was to back around in front of Pier 5, and then go ahead, turning to starboard on to a course direct to Four Mile Rock, which is located between West Point and the docks in question. The regular course of the "Indianapolis" in coming from Tacoma, was to come around the bell-buoy just off Duwamish Head, opposite West Seattle, and then steer to a point between the Colman Dock and the Grand Trunk Dock, when she would change her course slightly and run in along the face of the Colman Dock.

During the afternoon of the day of the collision, a very dense fog hung over Elliott Bay. The "Kitsap" left her berth at 4:35 P. M., backing in front of Pier 5, and then going ahead and turning to starboard on to her regular course. The "In-

dianapolis'' passed the bell-buoy at 4:33 P. M. The collision occurred at 4:40 P. M. Both vessels were being operated in the fog after the ''Indianapolis'' passed the bell-buoy, and both were regularly sounding fog signals. Neither vessel could be seen from the other until a very short distance apart. The ''Indianapolis'' struck the ''Kitsap'' on her port bow, just forward of her pilot house, cutting into her about seven feet, and causing her to sink within about twenty minutes. The ''Kitsap'' was afterwards located at a depth of about 238 feet, and subsequently raised and repaired.

There was no evidence offered by Appellee to contradict Appellant's testimony as to the amount of damage sustained by the ''Kitsap.'' The only question raised by Appellee as to the amount of damages claimed by Appellant, was as to the basis upon which demurrage should be figured, and as to the item of $1,500.00 claimed by the Appellant for damage to the boilers of the ''Kitsap'' by being submerged; the Court allowing Appellant only $50.00 per day demurrage, instead of $103.00 per day as claimed by it, and disallowing the item of $1,500.00 damage to the boilers. Appellee also contests Appellant's right to recover for salvage of the

"Kitsap," which was allowed by the trial court. Appellant offered no evidence to contradict the evidence of Appellee as to the damage to the "Indianapolis," and the Court allowed such damage, estimating the demurrage due the "Indianapolis" on the same basis as it allowed demurrage to the "Kitsap;" that is, on the basis of the net earnings of the respective vessels as stipulated in the case.

The questions involved in this statement of facts and presented here by the Assignment of Errors, together with the manner in which those questions are raised upon the record, are as follows:

I.

Appellee will claim that the finding of the trial court that the "Indianapolis" was at fault is not sustained by the evidence. Appellant will claim that this finding is amply sustained by the evidence, and in fact, that no other finding could be made under the evidence.

II.

Appellant contends that the finding of the trial court that the "Kitsap" was at fault is not sustained by the evidence; but that the evidence shows clearly that the "Kitsap" was not at fault, that

she was operated with all proper care and caution, in strict accordance with the rules of navigation, and that the Court erred in finding the "Kitsap" at fault, and in decreeing that the damages caused by the collision should be divided.

Appellant's Assignment of Errors Nos. 1, 2, 6 and 7 will be discussed under this heading.

III.

The Court allowed Appellant only $50.00 per day demurrage for the "Kitsap" during the period she was being raised and repaired; while Appellant claims that it was entitled to demurrage at the rate of $103.00 per day, being the net charter value of the Steamer "Hyak," which was employed to take the run of the "Kitsap" during this period.

Appellant's Assignment of Error No. 3 will be discussed under this heading.

IV.

Appellant claimed $1,500.00 for non-repairable damage to the boilers of the "Kitsap" by reason of the submersion, which the Court refused to allow.

Assignment of Error No. 4 will be discussed under this heading.

V.

The Court refused to allow any interest to Appellant on the sums expended by it in making repairs to the "Kitsap," or any interest prior to the date of the decree upon amounts due it.

Assignment of Error No. 5 will be discussed under this heading.

SPECIFICATIONS OF ERROR RELIED UPON.

I.

The Court erred in finding and decreeing that the collision mentioned in the pleadings between the steamship "Kitsap" and the steamship "Indianapolis," resulted from the mutual fault of said steamship "Kitsap" and said steamship "Indianapolis," and in refusing to find and decree that said collision resulted from the sole fault and negligence of the said steamship "Indianapolis."

II.

The Court erred in finding and decreeing in said cause that the damage resulting from the collision mentioned in the pleadings should be divided, and that said libelant should recover only one-half of the damage sustained by it and resulting from said collision, and that said libelant should pay to the said International Steamship Company, claimant and cross-libelant herein, one-half of the damages of said steamship "Indianapolis" found to have resulted from said collision.

III.

The Court erred in finding the amount of damage in the nature of demurrage, to which said libelant was entitled, at the sum of Fifty Dollars ($50.00) per day during the one hundred thirty-nine (139) days of detention of the steamship "Kitsap" resulting from said collision, and in refusing to award to said libelant damages in the nature of demurrage for the said detention at a higher rate or greater sum than Fifty Dollars ($50.00) per day.

IV.

The Court erred in refusing to allow and award to said libelant, as a part of the damages sustained by it as a result of said collision any amount or sum for depreciation in the value of the boilers of said steamship "Kitsap" due to a submersion of said boilers, resulting from said collision.

V.

The Court erred in refusing to allow the Libelant any interest upon the sums expended by it for the repairs upon said steamship "Kitsap" resulting from said collision, and in refusing to allow any interest prior to the date of said decree upon

the amounts due to said Libelant from said Claimant and Cross-Libelant as damages resulting from said collision.

VI.

The Court erred in refusing to allow, award and decree to Libelant the full amount of damages sustained by it as a result of the collision between the said steamship "Kitsap" and the said steamship "Indianapolis" together with interest thereon and its costs upon said suit as prayed for in its said libel.

VII.

The Court erred in refusing to dismiss the cross-libel filed by said International Steamship Company in said cause.

ARGUMENT.

Movements of the "Indianapolis."

We will first consider the course, handling and action of the "Indianapolis" from the time she rounded the bell-buoy off Duwamish Head, two miles from her berth and one and three-quarter miles from the point of collision, until the collision occurred, and see if there is any doubt as to her fault.

The "Indianapolis" left Tacoma on this run at her usual time. It was foggy leaving Tacoma (R. p. 141), but later it cleared somewhat, and was more or less clear until after the vessel passed Alki Point. At some place between Alki Point and the bell-buoy the "Indianapolis" ran into a fog (R. pp. 152, 173). Up to this time she was making schedule time, running full speed (R. 152). The master, who had been lying down, took charge at the bell-buoy. The fog was so thick that he could not see the buoy (R. pp. 142, 152, 153, 210). Just before leaving the bell-buoy the mate, who had been in charge of the vessel, slowed her down because of the fog (R. p. 153). He ran under a slow bell possibly half a minute, when the Captain gave or-

ders for full speed ahead, and he proceeded to run his vessel for five minutes at full speed, or fifteen knots an hour (R. pp. 143, 155, 160, 295), from the bell-buoy toward the crowded harbor of Seattle, in one of the densest fogs ever known on Elliott Bay, which, according to his own testimony, got thicker and thicker as he got nearer the City, where the smoke was mixed with the fog. He says that he did not hear any other whistles during this time, but the evidence of the witness Jacobs, for Appellee, who was a passenger on the "Indianapolis" and stood upon her upper deck, was that they heard whistles all the time (R. p. 213); and of the witness Percival, also for Appellee, was that they heard whistles all the way across (R. p. 253).

After running full speed for five minutes into this fog and covering a distance of one and one-quarter nautical miles (R. p. 143), Captain Penfield testified that at 4:38 he had the speed of the "Indianapolis" reduced to half speed (R. pp. 143, 155), which he says means that her engines were making 130 revolutions instead of 154, and that she would run twelve knots an hour instead of fifteen (R. p. 155). He testified that he then put her under slow bell, at which she would make

ninety turns, and that at 4:39 he stopped her engines (R. pp. 143, 158). He said he was positive that he stopped at 4:39, because he looked at the clock (R. p. 158). The next order that he says he gave was for slow astern (R. pp. 144, 158). He says he gave this slow speed astern bell about a minute after he stopped his engines, which would be about one minute after 4:39, or practically at the time of the collision (R. p. 159). Later he said that it was a few seconds before the collision (R. p. 164) . He says that he next gave orders for half speed astern (R. pp. 146, 163), and that next he gave orders for full speed astern (R. p. 163).

That these bells to reverse the engines were given within a few seconds of the collision, we think clearly appears from the evidence of both Captain Penfield and Mate Anderson. In fact, Captain Penfield testified that he saw the "Kitsap's" lights before he even gave the *half speed astern* order (R. p. 163). The mate says that he heard Captain Penfield sing out the order for *half speed astern*, and that "it was just when I seen the light" of the "Kitsap," (R. pp. 174, 179), and that the collision was almost immediately after (R. p. 178). In short, according to this evi-

dence of Captain Penfield, the "Indianapolis" ran fiive minutes at full speed or fifteen knots an hour, then at half speed, or twelve knots an hour for a fraction of a minute, and then at slow speed or 90 revolutions instead of 154, her full speed, for the balance of this minute. As witness H. A. Evans shows this slow speed at 90 revolutions would be at least 9½ miles per hour (R. 353). Captain Penfield testified that next the engines were stopped and the vessel drifted with this momentum for a few seconds, depending on whether the collision was at 4:39½ or 4:40; then, although the "Kitsap" was heard all the time, ten or fifteen seconds before the collision, a *slow speed astern* bell was given, and after the "Kitsap" was seen 60 to 75 feet away, a *half speed astern bell* was given instead of a full speed astern, which was given later. Although Captain Penfield testifies that he gave these different bells, it must be remembered that there is no evidence in the record to sustain his statement that he ever gave a stop bell or a slow speed astern bell. The log was not produced, nor was the Quartermaster, who was at the wheel in the pilot house, sworn, or his absence accounted for, nor any other witness produced to corroborate this evidence. If

the bells were given, as Captain Penfield says, certainly the Quartermaster or some one in the engine room or on the boat could have so testified.

Engineer Thorn of the "Indianapolis" testified as to the bells he received and answered, and we wish to call particular attention to his testimony. He says they ran full speed to about the bell-buoy, then slowed to half speed, then proceeded at full speed again for about four minutes as nearly as he could recollect (R. p. 295). He says that he next got a slow bell; then a half speed astern bell, then full speed astern (R. pp. 295, 296, 297), the last just as he felt the impact of the collision (R. p. 297). He did not receive any stop bell nor slow astern bell, as testified by Captain Penfield. Proctor for Appellee put the word "stop" into the witness's mouth on re-direct, but it is evident that the witness meant the bell given near the buoy, which he first called a stop bell (R. p. 297), meaning a slow or half speed bell.

This evidence corroborates our contention that the "Indianapolis" was running full speed or nearly full speed until just before the collision. It was necessary for her to do so to cover the distance between the buoy and the point of collision, which

all the evidence shows was a nautical mile and three-quarters. The chart offered by Captain Penfield shows this distance (Claimant's Exhibit 4); it is also shown by his evidence that at the time of the collision he was just about the right place to haul to his dock (R. p. 169), which point he says took him seven minutes to reach from the buoy in fair weather (R. p. 161); the evidence of the witnesses for Appellant who stood on the docks, also those who were on the steamer "Reliance," and of Lieutenant Stewart and Harbor Master Hill all show the same thing, and the place where the "Kitsap" was found was one and three-quarter knots from the buoy. All of this evidence will be particularly referred to and pointed out hereafter. To run one and three-quarter knots in the seven minutes between 4:33 and 4:40 required the "Indianapolis" to make her full speed all the time, just as she did in fair weather, because her full speed was one knot in four minutes or one and three-quarter knots in seven minutes.

There is also other evidence to sustain this contention. The witness Weld, for Appellant, was a passenger on the "Indianapolis" on this trip. He was sitting in the extreme stern of the "In-

dianapolis'' over her wheel. He had had years of experience on board of steam vessels. He felt the impact of the collision with the "Kitsap," but prior to that time did not notice any difference in the motion or vibration of the "Indianapolis" from the time she left Tacoma (R. pp. 87-89). Of course, it will not be disputed that the backing of the engines of the "Indianapolis," whether she was drifting, at rest, or moving forward, would cause considerable vibration of the ship, which would be very noticeable to a person sitting over her wheel. In fact, the passengers who testified in behalf of Appellee, base their estimate of the speed of the "Indianapolis" on the vibration or want of vibration of the "Indianapolis." Certainly, if the engines of the "Indianapolis" were backed before the collision, the vibration would have been noticeable to Mr. Weld, and the fact that he did not notice this vibration until he felt the impact of the collision, corroborates the statement of Engineer Thorn, that he received the order for full speed astern just at the time he felt the collision; and also that of Mate Anderson, that he heard the order for half speed astern, which was given be-

fore the order for full speed, just at the time he saw the lights of the "Kitsap."

Witness Gilbert, for Appellant, who was also a passenger on board the "Indianapolis," was on the main deck near the engine-room, and he did not notice any difference in the motion or vibration of the ship, nor hear any bells given in her engine-room prior to the collision, the impact of which was sufficient to knock him out of his chair (R. pp. 114-118).

There is also the testimony of the witness Foster, for Appellant, who stood on the port side of the "Kitsap," just aft of the pilot house, and at the exact spot where the "Indianapolis" struck the "Kitsap." Foster heard the bells given on the "Kitsap" to back her; felt her shake while she was backing (R. p. 91); looked at the water and was satisfied that she was standing still at the time of the collision (R. p. 92); and says that the "Indianapolis" was coming "pretty speedy," "showing a big white foam of water on her bow," and that she struck the "Kitsap" at the point where he stood (R. p. 92). In fact, when he first saw her in the fog, he says she was aimed at where he stood, and she struck that very spot, where she

was aimed at, and that his parcels which lay at his feet, dropped into the hole made in the "Kitsap" (R. p. 92); which shows conclusively that it was not the "Kitsap" that was moving forward, but that the "Indianapolis" was the moving object, and the "Kitsap" was at a standstill, otherwise the "Indianapolis" would have struck back of that spot.

The witness Ole Tongerose, for Appellant, who was one of the look-outs on the "Kitsap," stood just forward of where the "Indianapolis" struck, and says that she was coming very fast (R. p. 83); and the witness Totland, for Appellant, the look-out on the "Kitsap" who stood in her bow, says the "Indianapolis" was running fast; that he heard "her noise in the water, and saw the foam under her bow" (R. p. 121). Captain Hanson testified that the "Indianapolis" had very good speed on (R. p. 33).

Probably the strongest evidence of the speed of the "Indianapolis" is the cut she made in the "Kitsap." This is clearly shown in the pictures offered in evidence (Libelant's Exhibits E, F, G and H), which correctly show the damage done to the hull of the vessel. This cut is mute but con-

vincing testimony in support of the evidence of the witnesses we have referred to, that the "Indianapolis" was the moving object, and that her speed at the time of the collision was considerable. As witness H. A. Evans testified, this cut could not have been made through the stout iron wood guard of the "Kitsap" and her heavy planking and timbers, if the "Indianapolis" had not considerable headway at the time of the collision (R. pp. 370-389). As shown by Mr. Evans in his testimony and as the Court well knows, if the "Indianapolis" had been standing still or had sternway at this time, it would have been impossible to cut into the "Kitsap" as she did, or in fact, at all.

Appellee, realizing the full importance of this evidence, seeks to avoid this conclusion, by inference rather than directly, that the cut was caused by the "Kitsap" "impaling" herself upon the bow of the "Indianapolis." This contention seems to us so absurd that we do not wonder that no witness was produced in behalf of the Appellee who was willing to express a positive opinion that the "Kitsap" did "impale" herself on the bow of the "Indianapolis," nor offer any reason to support any such contention. In fact, we do not think this con-

tention worthy of more than passing notice, and we think the clear explanation of witness H. A. Evans, of the effect of the "Kitsap" moving forward, striking the bow of the "Indianapolis" standing still (R. pp. 378-380), so completely answers any contention that she impaled herself on the "Indianapolis" that no further argument on this point is required.

"When a collision occurs, as here, by the stem of a sailing vessel striking the side of a barge lashed to a steam tug, and with such force as to split open a new and stanchly-built vessel, and cause her to sink in a few minutes, it is not difficult to ascertain which vessel ran into the other. To affirm that the sailing vessel was nearly, if not quite, stationary, and that the barge ran into her, is an appeal to human credulity which ought not to be attempted in an intelligent court."

Brooks vs. The D. W. Lenox, 4 Fed. Cas. No. 1952.

In further support of our position that the "Indianapolis" had been making great speed prior to the collision, and was making considerable speed at that very time, is the testimony of Mr. Evans, who took the evidence of Captain Penfield and plotted the same on a Government chart of Elliott Bay (Libelant's Exhibit M), and showed by mathematical calculation which cannot be, and

has not been disputed, that the speed of the "Indianapolis" was very considerable at the actual time of the collision, and that it had been very great just prior thereto (R. pp. 351-356). These are matters of pure mathematics. We have the "Indianapolis" at the bell-buoy at 4:33. The distance to the point of collision was 1¾ nautical miles; the collision occurred at not later than 4:40; she had to make this distance of 1¾ nautical miles in seven minutes; her maximum full speed was fifteen knots, and she ran at this speed for five minutes as testified to by Captain Penfield; it is therefore merely a question of calculation as to what average speed she must have made to cover the balance of the distance, or one-half mile, in the next two minutes, *which is also at the rate of fifteen miles per hour.*

Proctor for Appellee will undoubtedly attempt to avoid the effect of this evidence by saying that Mr. Evans took the course of the "Indianapolis" as N.E. by E.¼E. magnetic, from the bell-buoy, and that he also took the marks on the course plotted by Captain Penfield on Claimant's Exhibit 4, as the different positions of the "Indianapolis" at the times stated, and that Captain Penfield, as he

attempted to say when he was last called to the stand, was mistaken in saying that this course was a magnetic course, but meant a compass course; and that the positions indicated on this Exhibit 4 were not intended to be accurate positions from true measurements.

We think, however, the Court will be satisfied that the actual course of the "Indianapolis" at this time was not NE by E½E magnetic. Captain Penfield testified that he hadtwo courses, one a fair weather course, the other a foggy weather course, from the bell-buoy to the dock (R. pp. 142, 145, 418). He testified positively several times that his foggy weather course was NE by E¼E (R. pp. 142, 149, 419), and when Proctor for Appellee asked him if he meant a magnetic course, he said "Yes" (R. p. 149). Captain Penfield has been to sea, according to his own testimony, for thirty years (R. p. 141); he has been Master of ships for many years; Proctor for Appellee has had wide experience in shipping cases, and both Proctor and Captain Penfield well knew the difference between a magnetic course and a compass course, and there could be no question but that Proctor meant and Captain Penfield understood that the

course he was testifying to was a magnetic course. As he admitted on his cross-examination (R. pp. 420-422), if he had been testifying to a compass course, not having given the deviation of his compass, no one, not knowing the deviation, could tell what that course was, and he intended to give a course which anyone could understand and draw.

After testifying as to what his course was in foggy weather, and on this identical trip, he then offered in evidence a Government chart of the Bay (Claimant's Exhibit 4), on which he stated he had drawn this identical course (R. p. 149), but he marked that course NE by E½E, magnetic, instead of NE by E¼E, as he had testified was the course he steered and was plotting on this chart. It was very apparent that he wanted it to appear from the chart that the course he steered took him to the Grand Trunk Dock instead of further north off Piers 4 or 5, as would have appeared if he had drawn on this chart a magnetic course NE by E¼E; yet it would not have done to draw the half course and mark it a quarter course, as that difference would be easily seen.

It is very material whether the course he steered was a quarter or a half course, as the half

course would make him clear the ordinary course of the "Kitsap," while the quarter course would throw the ship considerably north of Pier 4, and across the course of the "Kitsap." This is clearly explained by witness H. A. Evans (R. p. 350), and shown on Libelant's Exhibit M.

When it was found that we had noticed the discrepancy in Captain Penfield's testimony, he did the only possible thing he could do to get out of this hole, and that was to claim that the deviation of his compass was a quarter of a point eastward, just the difference between the quarter and the half course, so that a compass course NE by E¼E would be identical with a magnetic course NE by E½E. He therefore came to the stand and testified that this was the deviation of the compass of the "Indianapolis," but was forced to admit that although he had been Master of the "Indianapolis" for four years, he had never swung the compass during that time, nor had it been swung (R. p. 415); and as any one at all familiar with navigation knows, it was absolutely impossible for him to know whether the deviation of his compass was one-quarter of a point or more or less; in fact, he said that at one time on this particular course the

compass course was the magnetic course, and therefore, there was no deviation at all (R p. 423).

But when Captain Penfield gave this testimony, he apparently did not see the conclusion which necessarily followed therefrom. He testified positively that his fair weather course was NE by E½E (R. pp. 142, 419); he also testified positively that he always ran by his compass in fair weather, and never by land marks (R. p. 147); so that if his fair weather course was NE by E½E, compass, and the deviation of his compass was one-quarter of a point easterly, then this was identical with a magnetic course *NE by E¾E*, and this would carry him in fair weather a long distance south of the Colman Dock, where he berthed. When the questions were put to him which would show these facts, he saw at once the hole he was in, and he refused to answer until he had to (R. p. 422). All of this shows that he did not make a mistake when he testified that his course NE by E¼E was a magnetic course, and if it was such course, the course plotted by him on Claimant's Exhibit 4 was not the course he ran at this time; but that course, as the Court can easily see by placing a pair of parallel rulers on the chart, would have carried him to

Pier 4, as is shown by witness H. A. Evans on Claimant's Exhibit M, and if as Captain Penfield, when last on the stand admitted, he did not take the same departure from the bell-buoy in foggy weather that he took in fair weather, but that he went from two to three hundred feet outside the buoy, farther to the north (R. p. 418), then this course would have carried him that much farther north of Pier 4; it would have carried him to the exact spot where we say he was at the time of the collision, and where all Appellant's evidence places both vessels at that time. It would place him where the passengers on the "Reliance" heard the whistles, crash and voices; where Lieutenant Stewart heard the whistles; where Captain Hill heard the crash, and where the witnesses who stood on the ends of Piers 4 and 6 heard the collision: where the "Kitsap" would be, leaving when and as she did, making her usual turn, going her slow speed at sixty or sixty-five revolutions of her engines, and where the "Indianapolis" had no right to be running at such speed in such a fog, knowing the "Kitsap" was ahead on her starboard bow, all of which evidence will be particularly referred to hereafter.

Further, whether the course of the "Indianapolis" as plotted by Mr. Evans was her actual course at this time, or whether it was in fact a quarter of a point farther south, makes no difference, the distances on either course from the bell-buoy were the same; and whether the positions marked by Captain Penfield on Claimant's Exhibit 4 were in fact the actual positions of the "Indianapolis" at the different times stated by him, makes no difference. Mr. Evans did not base his testimony solely on these marks, but he did base it upon the evidence of Captain Penfield and the distance between the bell-buoy and the point of collision, wherever it might be, and then calculated where she must have been along either course, and at what speed she must have run to reach the point of collision. If she ran full speed for five minutes, and her full speed is fifteen knots an hour, then she ran one and one-fourth nautical miles in five minutes, and the point of collision, whether off Pier 5 or off the Colman Dock, was approximately one and three-fourths nautical miles from the bell-buoy, and the "Indianapolis" had to make this nautical half mile in the one and one-half or two minutes between 4:38 when Captain Penfield says she slowed

to half speed, or twelve miles an hour, and 4:39½ or 4:40, when the collision occurred, *which required the same speed.*

The Court knows that a vessel running five minutes at fifteen knots an hour, and then slowing to revolutions which ordinarily would drive her twelve miles an hour, would in fact, because of the momentum the ship already had, drive her more than twelve miles; and, even if later the engines were slowed to 90 revolutions, she would still have considerable headway, and she would carry this headway for a long distance, even if her engines were afterwards stopped, which the Engineer's evidence shows they were not, nor were they slowed to 90 revolutions.

Mr. Evans has given the average speed she must have made between 4:39 and 4:40, according to Captain Penfield's chart, as 9.18 knots, or approximately 10.5 miles an hour (R. p. 353). If this was the *average* speed, and her speed at 4:39 was twelve miles, she certainly had a great deal of speed at the time of the collision, even according to Captain Penfield's testimony.

We will not take the time to go into the evidence

of Mr. Evans on these various points, but would respectfully request the Court to carefully consider the same, together with the various exhibits introduced in connection with the evidence in behalf of the Appellant, and we feel satisfied that the Court will find Mr. Evans' conclusions are correct, and that our claim is correct that the "Indianapolis" at the very time of the collision, was moving as fast or faster than the "Kitsap" was moving at any time, and that her headway up to the very time of the collision had not been checked, nor had the reverse bells been given until within a *few seconds* of the collision. The "Indianapolis" therefore, was not under complete control during any of the time, after running into this heavy bank of fog outside the bell-buoy, until the collision occurred, as the law requires of vessels coming into a crowded harbor in a thick fog, where other vessels are coming and going, as they have a right to do at all times.

If we are correct in this conclusion, and the "Indianapolis" ran this speed, when, as testified by Captain Penfield and Mate Anderson, they had heard the fog whistles of the "Kitsap" at least two minutes before, and these fog signals, as they ad-

mitted, had been blowing regularly as required by the Rules, then there can be no doubt that the finding of fault on the part of the "Indianapolis" is amply sustained by the evidence,' and it would be useless for us to cite authorities to show that such action on the part of the "Indianapolis" was such gross carelessness as to render her liable in this suit. She violated the first part of Article XVI of the Rules of the Road. She also violated Article XIX of the Rules, because she had the "Kitsap" on her starboard bow for some time before the collision, and it was her duty to keep out of the way of the "Kitsap;" and she also violated Article XXIII, which required her to slacken her speed or stop or reverse.

MOVEMENTS OF THE "KITSAP."

Having considered the course, action and handling of the "Indianapolis" on this occasion, as shown by the evidence, we will next consider the evidence concerning the course, action and handling of the "Kitsap" from the time she left her berth until the collision took place.

The undisputed evidence shows, and the trial court found, that the "Kitsap" left the south side of Pier 4 at 4:35 P. M. There is positive testimony of witnesses who looked at clocks and watches that this was the correct time, and there is no claim that there was any difference between the clocks or watches from which this time was determined and the clock of the "Indianapolis," from which the times referred to in the testimony by Captain Penfield are taken; in fact, all parties agree that the collision occurred between 4:39 and 4:40 o'clock, according to the time of both boats, so that their time must have corresponded (R. pp. 37, 160).

The relation of Pier 4, from which the "Kitsap left, to the Colman Dock at which the "Indianapolis" berthed, is clearly shown in Libelant's Exhibit J. There is no dispute but that the "Kitsap"

regularly sounded her fog whistles from the time she left the dock until the collision. On leaving the south side of Pier 4, the undisputed evidence is that the "Kitsap" backed around the steamer "Reliance," then lying at the end of Pier 4, on a starboard helm to in front of Pier 5 (R. pp. 28, 302, 318, 327, 328, 337). Her Master, Captain Hanson, a man of years of experience sailing on Puget Sound, was at the wheel in the pilot house; her mate stood in front of the pilot house on watch, and two competent seamen were on the forward deck on the look-out, and she had a full crew (R. pp. 26, 31, 68, 69, 82). The chief engineer was at the engine (R. pp. 101, 102).

It took about one minute under a slow bell to back from her berth to in front of Pier 5. By reference to Libelant's Exhibit J, also to Claimant's Exhibit 9, the Court will see that Pier 5 is the next dock north of Pier 4, and about one hundred feet distant, so that the "Kitsap" backed between three and four hundred feet. The evidence of the Master of the "Kitsap" was that he backed as he usually did; that he "didn't give a jingle bell at the dock" (R. p. 42), and that it took about a minute backing (R. p. 43). The engineer who was in charge

of the engines testified that he was working the engines on the spring line while lying at the dock, and that he got one bell to stop, and two to back up, and that he backed for about one minute (R. p. 60). Witness Tongerose for Appellant, one of the lookout men on the "Kitsap," testified that she backed about half speed astern motion (R. p. 85). The witness Otho Anderson, for Appellant, fireman on the "Kitsap," who was in the fire-room next to the engine and in the same room, where he could hear the bells and see the engine, testified that one bell was given at the dock to stop, and two to back up, which the engineer answered; that the "Kitsap" was an oil burner, having two burners, and that only one was burning, and it was burning easy (R. p. 102); that if a full speed bell had been given, he would have had to turn on both burners to keep up steam (R. p. 106). There is no evidence to contradict this testimony, or to show that the "Kitsap" did not back slowly as stated by these witnesses.

After backing in front of Pier 5, the Captain gave one bell to stop and one bell to go ahead, and put his helm hard aport, and the vessel stopped and went ahead slowly, turning to starboard as indicated on Libelant's Exhibits J and M. The evi-

dence in support of this statement is also uncontradicted and seems conclusive to us. The Master stated positively that he gave one bell to stop and one to go ahead slow, and that she came ahead slow (R. pp. 29, 41, 43, 52). He testified that the "Kitsap" was making four or five miles an hour, while turning (R. p. 30); that she was handled so slow that he told the engineer to "go a little stronger" (R. pp. 50, 52), and that then she was going about five or six miles (R. p. 52). The engineer testified that he got one bell to stop and one to go ahead, and that he did stop and go ahead slow (R. p. 60). He says that he knows she was running slow by the way the engine was turning over; that it was making about sixty turns; that after about half a minute, "the Captain rang the gong and said 'a few turns more, a little stronger;'" that he "made it a little stronger," "about five more," and that she continued with sixty-five turns instead of 180 turns when running full speed, until he got a stop bell (R. p. 61).

Mate Welfare of the "Kitsap" testified that while the "Kitsap" was backing he stood on her stern, that he could hear the bells in the engine room, and that one bell to go ahead was given (R.

p. 68). He says the "Kitsap" was "running about four or five miles an hour, going very slow" (R. p. 69), and that a jingle meant full speed.

Look-out Tongerose testified that he looked at the water and that she was making three or four or five miles (R. p. 84). Witness Foster, for Appellant, who had had long experience at sea, and who stood on the main deck of the "Kitsap" next above the engine, just aft of the pilot house, heard one bell to go ahead (R. p. 90). Fireman Anderson of the "Kitsap" testified that they got a bell to go ahead, and he then came out of the fireroom and stood looking out of a port opposite the engine (R. p. 102); that the "Kitsap" was "running very slow" (R. p. 103); that he could tell this because he "could see the engine" and "had on one burner very easy and kept the steam up;" that there had been no bell to "hook on" from the time they got the one bell to go ahead until they got a stop bell before the collision (R. p. 104).

In addition to this evidence of those engaged in the actual operation of the "Kitsap," there is the testimony of eye witnesses who saw the "Kitsap" back away from the dock and come ahead making the turn to her course.

The "Reliance," which lay at the end of Pier 4, left just as the "Kitsap" was coming ahead. The "Reliance" backed and turned to a course for the bell-buoy, and was just astern of the "Kitsap" until after the "Kitsap" completed her turn (R. pp. 302, 303, 307, 319, 321, 328, 337). Witness M. B. Jackson for Appellant, was a passenger on the "Reliance," and he watched the "Kitsap" leave and turn until he saw her stern light as she was running at right angles to the "Reliance" (R. p. 303). He heard the danger whistles at the time of the collision, which he fixes at five or six minutes after the "Kitsap" left the dock (R. pp. 303, 306). Witness J. L. Shaw for Appellant, was a passenger on the "Reliance;" he saw the "Kitsap" leave, and watched her come ahead, turn and pass out of sight. He also heard the danger signals and heard Captain Hanson of the "Kitsap" shout after the collision (R. p. 319). He says the "Reliance" was going very slowly (R. p. 325). The "Kitsap" must have also been going slowly, if she had not gone so far before the collision but that voices could be heard on the "Reliance." Witness McDonald for Appellant, freight clerk on Pier 4, who stood at the end of that dock, heard the danger whistles, which ap-

peared off the end of Pier 5 (R. pp. 335, 336). Mr. Gazzam, President of Appellant Company, was also a passenger on the "Reliance." He watched the "Kitsap" leave and turn and go ahead, and testified that "both boats were going very slowly" (R. p. 337), "not to exceed five knots" (R. p. 343).

Witnes H. A. Evans, for Appellant, plotted on Libelant's Exhibit J, the course of the "Kitsap" from her berth at the dock to the point of collision, according to the testimony given by the witnesses for Appellant, and, taking the undisputed time of her leaving as 4:35, and the admitted time of the collision as 4:39½ or 4:40, computed the average speed in making this distance as 3.9 statute miles per hour; taking the course of the "Indianapolis" as starting from the bell-buoy (R. p. 365). If, however, the "Indianapolis" was two or three hundred feet north of the bell-buoy when she passed it, then the point of collision was that much farther north, and the "Kitsap's" average speed would be a little over this figure. These calculations corroborate the testimony of the witnesses above referred to, and as this is merely a matter of calculation the court can easily satisfy itself that Mr. Evans was correct.

It would seem to us that the foregoing testimony as to the speed of the "Kitsap" should not only be convincing but conclusive in the case. This should be especially true as there is no evidence to the contrary, except persons on the "Indianapolis," and the witnesses who stood at the end of the Colman Dock and claim to have seen the "Kitsap" go south past that dock. The evidence of these latter witnesses we will discuss later, in connection with our argument as to the course of the "Kitsap," which Appellee claims took her further south than the testimony above referred to shows. If the "Kitsap" had greater speed than was testified to by Appellant's witnesses, it is strange that Appellee did not find some of the passengers or crew of the "Kitsap" who could have testified to that fact.

The only evidence introduced by Appellee to show that the "Kitsap" was going faster than is claimed by Appellant is the testimony of the following witnesses:

Captain Penfield of the "Indianapolis" testified that the "Kitsap" "was traveling a pretty good gait" (R. p. 147). He says that he could see her lights sixty to seventy-five feet away, and her hull thirty-five to forty feet away (R. p. 168); that he

was in the pilot-house of the "Indianapolis" some thirty feet from her bow, and of course, if the "Indianapolis" was moving forward to the point of collision, it would be hard for him to determine, especially in the excitement of the moment, whether the "Kitsap" was moving fast or at all, or whether it was the "Indianapolis" which was moving; and naturally his interest in clearing himself and fixing the fault on the "Kitsap" would affect his judgment on this question.

The mate of the "Indianapolis" testified that the "Kitsap" was "going a good clip" (R. p. 175); but as he did not hear any bells on the "Indianapolis," and could not testify as to her speed, he could not tell whether it was the motion of the "Kitsap" or of the "Indianapolis," and he is also an interested witness. Further, both these witnesses say they first heard the "Kitsap's" whistle at 4:38 (R. pp. 156, 177), which was only two minutes before the collision, and both claim the "Kitsap" was then on the port bow of the "Indianapolis" moving south. Even if this was correct, the "Kitsap" could not have followed any course claimed by Appellee and reached the point of collision in two minutes or less, even if she ran at full speed. On the other

hand, if the "Kitsap" took the course claimed by Apellant, and ran at any speed greater than that testified to by Appellants' witnesses, she would have passed the point of collision before 4:40.

The witness Jacobs, for Appellee, testified that the "Kitsap" was making considerable speed (R. p. 209). But he also testified that the "Indianapolis" seemed to have some headway. He stood on the upper deck of the "Indianapolis" back of the pilot-house, and we think a reading of his testimony as to the speed of the "Indianapolis," and as to other things which occurred, will satisfy the court that he knew very little about the speed of either vessel, or what occurred. For instance, he was very positive that the "Indianapolis" never ran faster than half speed, which he said was eight and a half miles per hour, from west of the bell-buoy to the point of collision (R. p. 211), and that after running under this speed for two or three minutes, she slowed to less than half speed, and never again went faster (R. p. 212). This testimony is directly in conflict with the positive testimony of Captain Penfield that he ran full speed from the bell-buoy into the fog for five minutes, and the testimony of the engineer of the "Indianapolis," that he ran the

engine full speed for at least four minutes during this period; and is also contrary to the conclusive fact that it would be physically impossible for a vessel to cover the distance between the bell-buoy and the point of collision, which it is agreed was at least one and three-quarter nautical miles from the buoy, in seven minutes or less, if she never ran over eight and one-half statute miles per hour.

The evidence of this witness is also shown to have little weight by the fact that he testified that he heard the "Kitsap's" whistles two or three points on the port bow of the "Indianapolis," and then two or three points on the starboard bow (R. pp. 214, 215). But none of the other witnesses claim to have heard these whistles more than one or one and one-half points on either bow. As shown by the witness H. A. Evans, if the "Kitsap" had been two and one-half points on the port bow of the "Indianapolis" at any time, and then later two and one-half points on the starboard bow, the "Indianapolis" at all times maintaining her course within one-sixteenth of a degree, as stated by Captain Penfield (R. p. 146), the "Kitsap" would have had to run over twenty miles per hour to have traveled the distance between these points and reached the

point of collision in the time given by the witnesses (R. p. 362). This, of course, was impossible, as the maximum speed of the "Kitsap" was only fifteen miles per hour.

Witness Percival, for Appellee, also claimed that the "Kitsap" was running very fast (R. p. 251); but his evidence is so contradictory to the other evidence in the case that we think it will have very little weight with the court. He testified that he was standing in the eyes of the "Indianapolis"; that he did not hear any of the bells given on the "Indianapolis" to the engine room at any time, and could only judge of her speed from the feel of the vessel (R. p. 252). He also testified that he thought the engines of the "Indianapolis" were dead for about three minutes before the collision occurred; that she never went ahead during these three minutes (R. p. 254). As shown by witness Evans (R. pp. 362, 363), this was absolutely impossible, as the "Indianapolis" could not have reached the point of collision if her engines had been dead during this time; and, of course, the evidence of Captain Penfield and of the engineer of the "Indianapolis" shows that they were not dead for three minutes. This witness admitted that he thought the "Indi-

anapolis" had some forward motion at the time of the collision, and that in his opinion the "Kitsap" was backing at the time the "Indianapolis" struck her (R. pp. 256, 260). He also stated that the "Indianapolis" backed just before he could see the glimmer of the lights on the "Kitsap" (R. p. 257). It is very apparent that his whole testimony as to the speed of the "Indianapolis" was based on the fact that he did not notice her vibration, while he was standing on her bow looking into the fog, which, of course, he could not do so long as she was running ahead, because she would then have very little vibration, if any, at that point.

In connection with this evidence, we wish to call the court's attention to the following observations of the courts concerning this character of evidence:

"The established rule is that the testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to greater weight than that of witnesses on other boats, who judge or form opinions merely from observation."

The Alexander Folsom, 52 Fed. 403, 411.

"Courts of admiralty are inclined to accept the statements of the crew as to the movements of their

own ship rather than those coming from those on board the other vessel."

The Hope, 4 Fed. 89, 93.

"In cases of collision, where there is great conflict of testimony, the court must be governed chiefly by undeniable and leading facts, if such exist in the case."

The Great Republic, 23 Wall 20.

"Superior credit must be given in regard to a vessel's own movements, to the testimony of those on board of her, where it is probable and consistent and not overborne by any decided weight of other testimony."

Carll vs. The Erastus Wiman, 20 Fed. 245, 248.

"In attempting to gather the actual facts of a collision from the contradictory testimony of witnesses, it should be borne in mind: (1) That the testimony of the crew of each vessel, with regard to her course and the various orders given to and executed by the wheelsman and engineer, should be credited in preference to the testimony of an equal number of witnesses upon another vessel relating to her movements, as they appeared to them."

The Alberta, 23 Fed. 807, 810.

Speaking of the testimony of witnesses on a vessel with reference to the speed of another vessel

colliding with the first vessel, the court used this language:

"The libelant's witnesses think she did not move back soon enough, and had not conquered her headway when the collision occurred, nor made more than one or two revolutions backward, while her own people say she had not only stopped her headway, but was actually moving back when the collision occurred. Her own officers were in the best position to know this fact, and, other things being equal, their testimony is to prevail over that of observers from the shore or on the Lane and her barges."

The Cherokee, 15 Fed. 119, 121.

"We are not impressed with the value of the passenger's testimony (as to the speed of the vessel), although he was an intelligent and candid witness. He was standing at the Delaware's port bow, leaning upon the rail at the point where it was carried away by the collision, and his attention was attracted by the signals and the bells to reverse. * * * Manifestly, the witness was speaking from impressions rather than from any tangible, evidential facts. The time for observation consisted of the few seconds, fraught with apprehension and excitement, that intervened between the time he saw the St. Louis, 50 or 75 feet away, and the time the vessels came together. * * * The opinion of a nautical man under similar circumstances would be of little probative weight, and that of a non-expert ought not to be entitled to as much."

The St. Louis, 98 Fed. 750.

"The estimates as to speed given by passengers who are not experts are generally unsatisfactory."

La Bourgogne, 139 Fed. 433, 443.

Evidence of the respective speed of the vessels in a collision may be deduced from the cut resulting therefrom.

The John I. Brady, 115 Fed. 204.

"The wound itself is the one fact which outweighs all the other evidence. It cannot be argued or explained away."

The Alberta, supra.

The evidence of experts who have examined the injury after a collision was held competent by this court as to the speed of the vessels, in the case of *The Belgian King,* 125 Fed. 869, 876.

"Mere expletive or declamatory words or phrases as descriptive of speed or acts unaccompanied by any evidence capable of conveying to the ordinary mind some definite conception of a specific physical fact, and depending generally upon the degree of nervous emotion, exuberance of diction, and volatility of imagination of the witness, and not upon his capacity to reproduce by language a true picture of a past event, are of slight, if, indeed, they are of any, assistance in determining the real

character of the fact respecting which they are used."

Foley vs. Boston & M. R. R. Co. (Mass.), 79 N. E. 765.

The only other evidence offered by Appellee with reference to the speed of the "Kitsap," and also with reference to her course after leaving Pier 4, was the testimony of four witnesses who claimed to have stood on the end of the Colman Dock, and to have seen the "Kitsap" pass that dock. We will discuss this testimony in detail in connection with our argument as to the course taken by the "Kitsap," as all of these witnesses testified that the vessel they took to be the "Kitsap" was going in a different direction from the point of collision when they saw her.

The trial court found that at the moment of the collision both vessels were moving ahead with considerable momentum, and rejected as untrue all the evidence to the contrary, and stated that "the conclusion is unavoidable that the collision was caused by navigating both vessels at a high rate of speed in a dense fog, and both are equally at fault" (R. p. 423). To reach this conclusion as to the "Kitsap," the court had to disregard the positive testimony of

the officers of the "Kitsap" as to the bells given and answered, the fact that she was using only one fire, the number of turns her engines were making, and the testimony of all Appellant's witnesses as to the actual speed the vessel was making. It also disregarded the calculations of witness Evans as to the speed the "Kitsap" must have made in order to cover the distance on the course Appellant's witnesses testified the "Kitsap" took, as well as on the course Appellee claims she took, which calculations are easy to verify and have never been disputed. The court must also have disregarded the evidence of speed deducible from the cut made in the "Kitsap," as explained by witness Evans (R. pp. 370-376), and his opinion based thereon. And the court must have based its finding, as to the "Kitsap," solely upon the evidence of the two officers of the "Indianapolis" and her two passengers, who were the only witnesses for Appellee who testified directly as to the "Kitsap's" speed at the time of the collision; although the court disregarded the evidence of these same witnesses as to the speed of the "Indianapolis" herself. The court also disregarded the undisputed evidence that if the "Kitsap" took either course, and ran on that course at

"a high rate of speed," she would necessarily have been far past the point of collision in the undisputed time of five minutes between leaving her dock and the collision.

The only possible way the court could make this finding as to the "Kitsap" was to accept as true the testimony of the four witnesses who stood on the end of the Colman Dock, to the effect that the "Kitsap" passed south beyond that dock, and therefore ran a longer course than claimed by Appellant, which would require a greater speed than testified to by Appellant's witnesses; but if her speed was ten or twelve miles, as they testified, she would have passed the point of collision. But at the same time, the court found that the "Ktisap," after backing, "went ahead curving to starboard, until she came around on her *regular course* headed for Four Mile rock, on the north shore of the harbor" (R. p. 432). The uncontradicted evidence shows that the "regular course" of the "Kitsap" was not south of the Grand Trunk Dock, nor as far south as the point between the Grand Trunk Dock and the Colman Dock, where the court found the point of collision to be. These findings are absolutely inconsistive and are, we think, not only un-

supported by the evidence, but both findings cannot possibly be correct.

We did not think proctor for Appellee will attempt to argue that the evidence supports any finding that the "Kitsap" was running at any greater speed at any time than as testified to by Appellant's witnesses, if the "Kitsap", did run on her "regular course," as found by the trial court. But he will claim that the "Kitsap" did not run her regular course, but went far south of that course, as shown by Claimant's Exhibit 9, and that this course being longer than the "regular course," required her to run faster, and of course, in that event, the court's finding that she "came around on her regular course" could not be correct. We will, therefore, discuss the evidence as to the course of the "Kitsap" on this trip, and the point of collision.

The regular course of the "Kitsap," as testified to by Appellant's witnesses, and not contradicted, is shown on Libelant's Exhibit J, which also shows the course of the "Indianapolis" N.E. by E.¼E. from the bell-buoy, as testified to by Captain Penfield; and it also shows the course of the steamer "Reliance" on leaving the dock. The regular course of

the "Kitsap," also the course of the "Indianapolis" N.E. by E.¼E. from the bell-buoy, is shown on Libelant's Exhibit M; and in red, on this exhibit is shown the course the Appellee claims the "Kitsap" took on the trip in question. On Claimant's Exhibit 4 is drawn the *fair weather* course of the "Indianapolis" from the bell-buoy N.E. by E.½E., which shows that this course comes south of the Grand Trunk Dock, and by comparison with Libelant's Exhibit M and Claimant's Exhibit 9, shows that such course does not cross the regular course of the "Kitsap." Claimant's Exhibit 4 also shows what Appellee claims was the course of the "Kitsap" at the time in question. This is also clearly shown by Claimant on its Exhibit 9, where it is marked the "ordinary" course of the "Kitsap," also the course it claims the "Kitsap" took at the time in question, and the course of the "Indianapolis." It must be remembered that the course of the "Indianapolis," as shown on this Exhibit 9, is her fair weather course, N.E. by E.½E., and not the course N.E. by E.¼E., which Captain Penfield testified he ran this trip, and which would take him to a point off the north side of Pier 4.

The trial court found the point of collision to

be where the line marked "Course of Kitsap, Dec. 14," crosses the line marked "Course of S. S. Indiapapolis" on Claimant's Exhibit 9. But the court also found that the "Kitsap" turned on her "regular course," and the court will see that this regular course does not even touch the line marked "Course of S. S. Indianapolis," nor come within one hundred feet of the point of collision, as found by the trial court. It cannot be claimed that the "Indianapolis" was in fact on the northerly course, and that the collision occurred where the line marked "Course of Kitsap, Dec. 14," would cross that course, because such a point would not be between the Grand Trunk Dock and the Colman Dock.

The trial court must have entirely disregarded the testimony of Captain Penfield as to his departure from the bell-buoy at this time that his course was N.E. by E.¼E. from the bell-buoy, and all the evidence of Appellant's witnesses as to the course of the "Kitsap," and where they heard the collision; and the court must have intended to find the point of collision as indicated on Claimant's Exhibit 9, although such a finding is inconsistent with his finding that the "Kitsap" turned on her regular course. We think the evidence fully sustains our

contention that the "Kitsap" did turn on her regular course at this time, not on the course marked "Course of Kitsap, Dec. 14," on Claimant's Exhibit 9; and if we are correct in this, it is a matter of absolute certainty, demonstrable by mathematical calculation, that the collision took place north of where the court found it to be, and that the "Kitsap" could not have been running at a high rate of speed, or any speed in excess of that testified to by Appellant's witnesses, because such a speed would have placed her far past such a point at 4:39½ or 4:40.

The only witnesses on behalf of Appellee who testified as to the course of the "Kitsap" at this time, or at any other time, were the four witnesses who claimed to have stood on the end of the Colman Dock.

The first of these witnesses was Frank Burns, general manager of Appellee Company. He testified that he saw the "Kitsap" pass the Colman Dock, headed south right across the end of the dock, at right angles, and about one hundred feet away, running ten or twelve miles per hour (R. pp. 181, 182, 186). He testified that, in his opinion, it was 4:42 or 4:43 that he saw the "Kitsap;" that

it was two or three minutes after the "Indianapolis" was due in at that dock, and that she was due at 4:40 (R. p. 186). He said that he saw the "Kitsap" about one hundred to one hundred and twenty-five feet away (R. p. 186); that he did not see her name (R. p. 192); that she was in sight for about a minute; that she did not appear to be turning (R. p. 186), but that she appeared to be running at this speed down the face of the dock to the south, and that about *three minutes later* he heard the danger signals off the end of the Colman Dock (R. p. 187). While the witness was ready to state positively that it was the "Kitsap" which he saw, without seeing her name, and, although he admitted that it was foggy, so that he could see only a dim light on the Grand Trunk Dock some of the time (R. p. 186), we do not think this evidence will have any weight with the court. In the first place, he fixes the time positively as after the time the collision had actually occurred; and in the next place, he fixes the collision some *six minutes* after all the other witnesses agree that it occurred; again he says that the vessel which he saw was running at right angles along the front of the dock, and it did not appear to be turning. If it was the "Kitsap"

it was necessary that she make a turn after she had passed out of sight of this witness, and would place the collision long after it actually occurred. It must, therefore, be true that if the witness saw any vessel passing the dock at all, it was not the "Kitsap" but some other vessel.

We would call the court's attention especially to the evidence of witness Evans concerning this testimony of Mr. Burns (R. p. 357).

Witness Brydesen, who testified that he was standing on the end of the Colman Dock with Mr. Burns at this time, also claimed to have seen the "Kitsap" go by. He fixes the time as 4:40 or 4:45, by the Colman Dock time, which was Western Union time, and the same time as that used by the "Indianapolis (R. p. 202). He was positive that it was at least 4:40; that it was after the time the "Indianapolis" was due, and that she was due at 4:40; he did not see the name of the vessel that passed (R. p. 203); he says he saw the ship some one hundred or one hundred and fifty feet out from the end of the dock (R. p. 197); but says that the fog was heavy one minute and the next minute could see one hundred feet or farther (R. p. 196). He must therefore have seen this vessel at the ex-

treme range of vision in the fog. He says that she was broadside to the end of the dock, headed at right angles to the dock, but was rounding slow (R. pp. 200, 201); that she was going ten miles or better (R. pp. 197, 201). He says he saw the outline of the boat (R. p. 203), and also admitted that it was extremely "thick weather" (R. p. 205). He testified that he was dispatcher of boats at the Colman Dock, that he knew their courses and also the ordinary course of the "Kitsap," and the "Kitsap's" ordinary course went "up to the Grand Trunk Dock," "she is just off the Grand Trunk Dock when she makes the turn" (R. pp. 201, 202). He did not hear the danger whistles, although he stood beside Mr. Burns who claims to have heard them, only a short distance away (R. p. 199). What we have said with reference to the testimony of the witness Burns applies to the testimony of this witness. It is impossible that the vessel he saw, if any, could have been the "Kitsap," as, according to all the evidence, she was not in this vicinity at this time, but was sinking after her collision somewhere north of the Colman Dock. We also call the court's attention to the testimony of the witness

Evans relative to this testimony of the witness Brydesen (R. pp. 357, 358).

Witness Tucker, a former employee of Appellee, was the third witness standing on the end of the Colman Dock. He testified that he saw the "Kitsap" go by. He did not remember the exact time, but said that the "Indianapolis" was due (R. pp. 222, 227, 228). He admitted that the fog was thick for an instant, but claimed that a wave would come which would thin it, so you could see two hundred feet (R. p. 221). The vessel he saw was traveling at a right angle to the end of the dock, but he says she was swinging a little (R. pp. 222, 225). He also gives her speed at approximately twelve miles an hour, and says that he saw her from one hundred and twenty-five to one hundred and fifty feet off the end of the dock. He did not see the name of the vessel, but could see her windows and a "dim outline" of the boat (R. p. 226). He heard the danger whistles not over five minutes after he heard the "Kitsap" leave the dock (R. p. 225). As we have shown, of course, this boat could not have been the "Kitsap."

The other of these four witnesses was the witness Gleason, another employee of the Appellee

Company, who also says that he was standing at the end of the dock at this time, and saw the "Kitsap" one hundred feet or more away; that she was traveling fast, about ten or twelve miles an hour (R. pp. 230, 231). He says the ship was going south, but swinging to starboard out into the bay (R. p. 230). He also fixes the time at from 4:40 to 4:45 (R. p. 231). He claims to have seen the ship for a minute (R. p. 231); that he last saw her one hundred feet south of the Colman Dock (R. p. 252). He did not see her name, nor see any lights on her, although the evidence is that the lights of the "Kitsap" were all burning (R. pp. 36, 307). There would seem to us to be no doubt that if this witness saw any vessel passing the dock, it was not the "Kitsap."

We think the evidence of witness H. A. Evans, with reference to the testimony of these witnesses, shows conclusively that they were mistaken when they testified that they saw the "Kitsap." Nor can it be claimed that they were mistaken as to the time when they claim to have seen this vessel passing the Colman Dock, because they all fix it so definitely. However, the testimony of the witnesses produced by appellant in its rebuttal, who saw the

"Kitsap" leave and make the turn from in front of Pier 5, and who stated positively that she never went south of the Grand Trunk Dock and, therefore, could not have been in front of the Colman Dock, nor within sight of witnesses standing at the end of the Colman Dock, as well as the testimony of the officers of the "Kitsap" as to her course at this time, will satisfy the court that these witnesses for Appellee were mistaken as to the vessel they saw, or that they did not see any such vessel, and that the "Kitsap" never did pass the dock. Certainly their evidence alone should not be sufficient to overcome the testimony of Appellant's witnesses on this question.

Lieutenant Stewart of the United States Navy, stationed at Bremerton, from 4:30 o'clock on this day stood on the extreme stern of the steamship "Kennedy," then lying on the outer face of the Colman Dock, with her stern much farther out than the balcony where these four witnesses stood. The leaving time of the "Kennedy" was 4:40. He was in a position to see any vessel passing that dock much better than the four witnesses above referred to. He states positively that he did not see any vessel pass by the dock before he heard the distress

signals from the "Kitsap" and "Indianapolis" at a point north of where he stood (R. pp. 298-300).

It is not disputed that the "Reliance" lay at the end of Pier 4 at the time the "Kitsap" backed out from the south side of this pier, and that the "Reliance" left the dock, turning to her course for the bell-buoy just about as the "Kitsap" came ahead after backing in front of Pier 5. The evidence of Captain Wallace, then the first mate of the "Reliance," and the testimony of several passengers on board of her, is positive that the "Kitsap" never went south of the "Reliance," but at all times was on her starboard side; that the "Reliance" made her usual turn to her course to the bell-buoy, which ordinarily would not have, and in this case did not carry her south of the Grand Trunk Dock. Captain Wallace saw the "Kitsap" leave, back around the "Reliance" and go ahead, swinging to starboard out into the bay (R. p. 328). The "Reliance" left just as the "Kitsap" was steaming ahead. She gave a kick back and turned to starboard, the "Kitsap" always remaining on her starboard side (R. pp. 328, 330). The "Kitsap" kept turning to starboard until she was headed northerly toward Four Mile Rock (R. p. 329). The regular

course of the "Reliance" never took her south of the Grand Trunk Dock, and she did not go south of that dock at this time, and the "Kitsap" was north of her all the time (R. pp. 329, 330). He heard the danger whistles of the two vessels north of the "Reliance" (R. pp. 330, 332).

Witness Jackson, a passenger on the "Reliance," testified that the "Reliance" made a course following the "Kitsap," taking her usual course; that the "Kitsap" never went south of the "Reliance," but kept turning to starboard until she went out of sight, showing her stern light (R. pp. 301-303, 307). He did not notice any difference in the course of the "Reliance" at this time from her ordinary course, with which he was familiar, as he had been riding on the "Reliance" daily for some time.

Mr. Gazzam was a passenger on the "Reliance." He testified that he stood forward of the pilot-house and saw the "Kitsap" leave and swing; that she never went south of the "Reliance," and that the "Reliance" made her usual turn, never going south of the Grand Trunk Dock. He also heard the whistles of the "Kitsap" to the north of the "Reliance" (R. pp. 337, 342).

Witness Shaw was a passenger on the "Reliance" and saw the "Kitsap" leave and turn out of sight, remaining always to the north of the "Reliance" (R. pp. 319, 321). He says he could see the fireboat lying at the City Dock between the Grand Trunk Dock and Pier 3, which was the next pier south of Pier 4, and testified that the "Reliance" did not go south of the Grand Trunk Dock (R. pp. 320, 322, 326).

Harbormaster Hill testified that he was in his office in the tower on the outer corner of the Grand Trunk Dock toward Pier 4, and saw the "Kitsap" make the turn, and that she did not go south of the Grand Trunk Dock; he heard the crash of the collision two and one-half points off the Grand Trunk Dock to the northwest (R. pp. 405, 407, 410).

Witness Kurin, wharfinger on Pier 4, testified that he stood at the end of Pier 4 and heard the danger whistles of both boats to his right while he was facing the bay, as he showed on Libelant's Exhibit K (R. pp. 309-11).

Witness McDonald also stood on the end of Pier 4, and heard the danger whistles to his right (R. pp. 335, 336).

Witness F. L. Evans, wharfinger on Pier 6, was on the end of that dock, which was the second pier north of Pier 4. He testified that he heard the crash of the collision, the breaking of glass and the voices, which appeared to him six hundred to eight hundred feet south or west of where he stood, as he indicated on Libelant's Exhibit L (R. pp. 312-313).

Besides these witnesses, there is the testimony of the officers and crew of the "Kitsap" as to her ordinary course, and her course on this trip. Captain Hanson testified that he put the helm hard aport when the "Kitsap" came ahead after backing in front of Pier 5, just as he usually did; that coming ahead at slow speed under this helm the "Kitsap" would go to the north corner of the Grand Trunk Dock, and that she never went south of the Grand Trunk Dock (R. pp. 29, 30); that at this time the "Kitsap" came around on her usual course W. by S.¼S. for Four Mile Rock (R. pp. 30-31); that the tide was running northerly in the direction of his course for Four Mile Rock about one mile an hour (R. pp. 35-36), and that the "Kitsap" was north of Pier 4 at the time of the collision (R. p. 36).

Mate Welfare testified that in making her usual course the "Kitsap" never went south of the Grand Trunk Dock, and that when the "Kitsap" went ahead her helm was hard aport (R. pp. 66, 67, 68, 77).

Lookout Tongerose testified that the "Kitsap" went ahead "swinging all the time" (R. p. 79), and that she usually went "just about to the Grand Trunk Dock," never south of it (R. p. 80).

It would seem to us that this testimony should be sufficient to satisfy the court that the "Kitsap," on the trip in question, never went far enough south to turn and pass the point the trial court found the collision occurred. It certainly should be sufficient to overcome the vague, contradictory and improbable statements of the four witnesses for Appellee, who stood on the end of the Colman Dock, and who might be easily mistaken, especially in view of their interest in this suit.

There is no evidence that either the "Kitsap" or the "Reliance," on leaving Pier 4 and turning on their respective courses, ordinarily ever went south of the Grand Trunk Dock. Certainly if they had ever gone south of that dock in making this turn, Appellee would have been able to secure some

evidence of this fact. On the other hand, Appellee introduced a drawing (Claimant's Exhibit 9), showing the ordinary course of the "Kitsap" as testified to by Appellant's witnesses. No reason has been or can be given or suggested why either the "Kitsap" or the "Reliance," on leaving this pier at this time to turn to their ordinary courses, should have gone farther south than they usually did, or than they would naturally be carried in making this turn. In fact, there is every reason to suppose that they would not go as far south at this time as they would ordinarily in clear weather, for the reason that they would naturally at this time go more slowly than in clear weather, and the more slowly they went, especially with the tide running northward, the shorter would be their turn, and the less likely that they would go south of their ordinary courses.

Neither of these vessels could have gone south of the Grand Trunk Dock, and especially not south of the Colman Dock, as testified to by Appellee's four witnesses, if their helms had been hard aport, as testified to. In fact, the "Kitsap" would have had to run some eight or nine hundred feet nearly straight, after coming ahead, before turning, and have passed across the course of the "Reliance" and

close across the end of the Grand Trunk Dock, if the testimony of these four witnesses is correct that they saw her from one hundred to one hundred and fifty feet off the Colman Dock. This clearly appears from the drawing introduced by Appellee as Claimant's Exhibit 9. But the "Kitsap" did not go there. The testimony of Lieutenant Stewart and all the evidence of disinterested witnesses, as well as all the circumstances in the case, fully corroborate the testimony of the officers of the "Kitsap" and the "Reliance" in this respect.

We feel that the court will be satisfied beyond a doubt that the "Kitsap," at this time, left Pier 4 and turned to her course in the ordinary way, never going south of the Grand Trunk Dock, and never crossing the course which the evidence shows the "Indianapolis" usually took to reach the Colman Dock, and the course which she should have taken at this time. We also think the court will be fully satisfied from the evidence, that the "Kitsap" never went faster than four or five miles an hour. If she took her ordinary course and left at the time it is undisputed that she did leave, and the collision occurred at 4:40, as all agree, it is a matter of mathematical calculation as to what speed she made dur-

ing this time between these points. The only theory upon which Appellee could claim the "Kitsap" made greater speed than is claimed by Appellant's witnesses, is to claim that she went farther south, and that her course between the point of departure at Pier 5 and the point of collision was a longer course, and that they had to travel faster in order to cover this distance in this time. But Appellee's evidence to establish this fact, as we have shown, is so inconsistent, so vague and improbable, even to the extent of impossibility, that we certainly do not think the court will feel that this evidence outweighs the positive testimony of Appellant's witnesses as to the course the "Kitsap" actually took at this time. Even if their testimony as to her course is correct, and that she was running ten or twelve miles on the course shown on Claimant's Exhibit 9, she would have passed either course of the "Indianapolis" before 4:40, as the court can easily prove.

If we are correct as to the course taken by the "Kitsap," then her speed is established by the mathematical calculations and the positive testimony of the officers and crew and passengers on the "Kitsap," to have been very slow, not to exceed at

any time five miles per hour. This speed cannot be claimed to be excessive on the part of the "Kitsap." Her maximum speed was fourteen or fifteen miles an hour; a speed of four or five miles per hour would give her little more than good steerage way, and would certainly leave her under complete control at all times. This was all that was required of her.

If we are correct as to the speed and course of the "Kitsap," then there was no fault on her part unless it occurred after she heard the "Indianapolis'" fog signals. We will therefore consider the evidence on this question.

When the "Kitsap" left the dock at this time, her master was in the pilot-house in charge of the wheel (R. p. 31). Her mate was first on her stern until she had ceased to back and came forward turning on her course, when he came forward of the pilot-house and stood there as an additional lookout while leaving the harbor. There were two lookouts on the bow, one on her extreme bow, a man of experience, and the other, also experienced, stood on the main passenger deck, just forward of the pilot-house (R. pp. 68-69). All passengers were back of the pilot-house (R. p. 82), and the windows

were open (R. p. 44). There was nothing to obstruct the vision or hearing of any of these officers. The "Kitsap" was sounding her fog signals regularly; her engineer was in the engine room in charge of the engines; she was proceeding slowly, and all her lights were burning (R. p. 36). No whistles from the "Indianapolis" were heard until the "Kitsap" had turned to her course toward Four Mile Rock. The captain, mate, both lookout men and witness Foster all testified positively to this (R. pp. 30, 31, 48, 49, 70, 80, 87, 93, 121). No whistle from the "Indianapolis" was ever heard on the starboard bow of the "Kitsap," nor while she was turning (R. pp. 31, 49, 80, 93, 131). In fact, the "Indianapolis" was too far from the "Kitsap" while the "Kitsap" was turning to hear her whistles; and as the "Indianapolis" did not hear the "Kitsap" until 4:38 (R. pp. 155, 177), the "Kitsap" could not have heard her whistles before that time. The "Kitsap" went ahead at 4:36; the "Indianapolis" was then one and one-quarter statute miles away; two minutes later, when the "Kitsap" had nearly completed her turn so that the "Indianapolis" was on her port side, the "Indianapolis" was still one-quarter of a statute mile

from the dock, and although the "Kitsap" had in the meantime gone away from the dock, there was certainly no time intervening while the "Indianapolis" was on the port side of the "Kitsap," that the "Indianapolis" was near enough to be heard, even if she happened to blow her whistles at just the right time to be heard before the "Kitsap" had turned. After the "Kitsap" had turned, and the "Indianapolis" had come near enough to be heard, her whistle was heard three or four points off the port bow. Both captain and mate knew that it was the "Indianapolis" (R. pp. 31, 70, 77). They knew they were on their own course (R. pp. 31, 47, 51, 69, 77), and that the course of the "Indinapalis," if she was on her regular course, as they had a right to assume at that time, would not cross their course, and there was no danger of a collision (R. pp. 39, 46, 53, 54, 55, 57). They were just leaving the docks of a large city in a heavy fog, where vessels were coming and going at all times; they had no reason to stop when they heard the first whistle of the "Indianapolis," and, in fact, it would have been extremely dangerous, both to themselves and other vessels, for them to do so and lose control of their vessel, unless the danger was so

imminent as to absolutely require it; but there was no apparent danger at this time. With the tide running, the "Indianapolis" coming in on a course which ordinarily would take her astern of the "Kitsap," the "Reliance" leaving on a course astern of the "Kitsap," the "Telegraph" coming in, and other vessels coming and going, or liable to come and go at any moment, it certainly would have been gross negligence under the circumstances, as shown by this evidence, for the "Kitsap" to have stopped when she heard the first whistle from the "Indianapolis." In no sense can it be claimed that Rule XVI of the Rules of the Road required her to stop at this time. The vessel they heard was known to them; her position was ascertained; she was a vessel having a daily regular run to and from the harbor; her regular course would amply clear them, and they had a right to assume that she was on that course until it later developed that she was not. Neither would the circumstances permit the "Kitsap" to stop in front of the docks under these conditions, until the danger of a collision with the "Indianapolis" was imminent.

Further, the "Kitsap" had the right of way under Rule XIX, as she was on the starboard bow

of the "Indianapolis," and by Rule XXI the "Kitsap" was required to keep her course and speed. She was sounding frequent fog signals which were heard on the "Indianapolis," and she had a right to assume at this time that the "Indianapolis" would obey the rules and keep out of her way. Further, she was proceeding very slowly, and was under complete control sufficient to enable her to be stopped before she could collide with any other vessel after seeing her, if the other vessel did not run into her. Under these circumstances, the "Kitsap" proceeded slowly, but eased off a little to starboard away from the "Indianapolis" (R. p. 77). A few seconds later they heard another whistle and then a third, and the captain of the "Kitsap" then immediately gave a bell to stop the engine (R. pp. 32, 49, 61, 62, 70, 87, 91, 96, 103); then almost immediately after he gave two bells and a jingle, the signal for full speed astern, all of which bells were immediately answered.

The "Kitsap," under these bells, came to a stop. This is shown by the evidence of Captain Hanson (R. pp. 33, 36, 37); by the evidence of Engineer Hanson, who says he answered the bells by opening the engine wide open (R. p. 62); by the

evidence of the mate, who says she would stop under these circumstances in fifteen or twenty seconds (R. pp. 71, 72); by the evidence of lookout Tongerose, who says she "was making astern" when struck (R. p. 81); by the evidence of Foster, who felt her shaking under the backing bells (R. p. 91), and says she was "dead still" (R. p. 92), which he knows because he looked at the water and could tell (R. p. 95); by the evidence of the fireman, who stood at a port near the engine, heard the bells, saw them answered, felt the shaking, and saw the white foam from her wheel (R. p. 103).

Besides this evidence is the testimony of the witness Evans, an expert of exceptional qualifications, that from a careful examination of the cut of the "Kitsap," in his opinion she had "practically no movement in the water along the line of her keel at the instant of collision" (R. pp. 370-379). We would respectfully call the attention of the court particularly to this evidence of Mr. Evans, which, because of his ability as an expert, the care with which he examined the question, preparing drawings and illustrations to make his evidence clear, and his entire want of any bias or interest in

the case, we believe entitles this evidence to great weight.

In the face of all this evidence, and in view of the authorities we have heretofore cited, as well as the well-known rules of law and common sense to be used in weighing testimony, we fail to see how the court can take the evidence of four witnesses on the "Indianapolis" as to the "Kitsap's" speed or motion at the time of the collision, to support a finding that she was then "moving ahead with considerable momentum," or at all. Especially should this be true when one of these very witnesses for Appellee admitted that in his opinion the "Kitsap" was backing at the time of the collision (R. pp. 256, 260). In fact, we believe the evidence, if carefully considered and weighed, will leave little doubt in the court's mind that the "Kitsap" was handled at all times with the greatest care and caution; that she complied strictly with the rules of navigation; that she kept her slow speed and course as she was bound to do, and was at all times under such control that she could be stopped before she would collide with the "Indianapolis," after seeing her, if the "Indianapolis" did not run into her, and that

if the "Indianapolis" had been under the same control no collision would have occurred.

It may be argued that because the "Indianapolis'" whistles were heard in the same general direction from the "Kitsap," they indicated danger. Of course, this argument could not apply to the first whistle, nor to the second; and after hearing the third whistle, she stopped, then backed at full speed and came to a standstill. Certainly nothing more could be done or was required. But we do not think three whistles from the same general direction in themselves indicate danger, especially when coming from a known vessel, having a known course clear of the course of the vessel hearing them; nor should such an argument have much weight under the evidence in this case as to the gross fault of the "Indianapolis" and the careful handling of the "Kitsap"; nor should it be sufficient to warrant a finding of mutual fault and a decree dividing the damages.

Appellee will probably claim that the "Kitsap" crossed the course of the "Indianapolis" twice, and was therefore negligent. The testimony of the various witneses in behalf of the Appellee that they heard the whistles of the "Kitsap" first on the port

bow, and then on the starboard bow, we think is entitled to very little weight. In the first place, as stated by numerous witnesses for both parties, there were a great many whistles sounding at this time in the harbor, and no one could be positive that the whistles he heard on the port bow of the "Indianapolis" were those of the "Kitsap"; and the fact that one witness (Jacobs) said that he heard these whistles two to two and one-half points off the port bow, while other witnesses say they heard the whistles not more than one point off the port bow, shows that they had reference to different whistles. It is admitted that the "Telegraph" came in from West Point at this time, and her whistles were on the port side of the "Indianapolis."

Further, as already shown, the "Indianapolis" did not hear the "Kitsap's" whistles until 4:38, two minutes before the collision (R. pp. 155, 177). If these whistles were on the port side of the "Indianapolis" at all, the "Kitsap" was then *north* of the Grand Trunk Dock at least, and she could not possibly pass to the starboard of the "Indianapolis" and turn and reach any point on any course of the "Indianapolis" in the two minutes before the collision. The court need only to measure on Claim-

ant's Exhibit 9 the distance necessary to travel in these two minutes from a point to port of the "Indianapolis" to her starboard and to a point on her course, and see the speed required to make that distance in two minutes, to see that this statement is true.

However, the conclusive answer is that if the "Indianapolis" was on the course N.E. by E.¼E., magnetic, as testified to by Captain Penfield, and the "Kitsap" backed in front of Pier 5, as all the evidence shows she did, she never could have been more than *two degrees* on the port bow of the "Indianapolis," which is only a trifle over *one-sixth of one point;* and she was at this point at 4:36, when the "Indianapolis" was only three minutes from the bell-buoy, and one and one-quarter miles from the "Kitsap," so far away that it was impossible to hear the whistles from the "Kitsap" on the "Indianapolis (R. pp. 356, 357).

If proctor would claim that the true course of the "Indianapolis" at this time was not NE. by E.¼E., magnetic, but this was the compass course, and the course was in fact N.E. by E.½E., magnetic, still the "Kitsap" at Pier 5 could have been only a fraction of a point on the port bow of the "Indi-

anapolis," and then at a time when the "Indianapolis" was about a mile and a quarter away, too far to hear her whistles. Again, if this latter course is the correct course, then the "Kitsap" could not have been even one point on the starboard bow of the "Indianapolis." Even if the testimony of the witnesses who tood on the end of the Colman Dock were true, and the "Kitsap" went as far south as they claim she did, she never was one point on the starboard bow of the "Indianapolis," no matter which course the "Indianapolis" was on. The court will readily see this is correct by drawing this course on the chart, and locating one point (11¼ degrees) north or south of it.

We would respectfully call the attention of the court to the testimony of witness H. A. Evans on this subject, which can be easily verified (R. pp. 355-357, 362).

Proctor will undoubtedly argue that the place where the "Kitsap" was found disproves our contention as to the location of the collision and the course of the two vessels. However, there is a simple but complete answer to this.

It is true that "Kitsap" was found near the

fair weather course of the "Indianapolis," on a line between the Colman and Grand Trunk Docks, and a short distance off the end of those docks. But this conclusively proves that she was *not struck* at this point, as she did not sink below the surface of the water untitl some twenty minutes after the collision. When struck, the "Kitsap" was headed toward Four Mile Rock in a westerly or northwesterly direction, and the "Indianapolis" was headed toward the docks. The "Indianapolis" backed away and then came back to the "Kitsap" holding against her bow, part of the time with lines on the "Kitsap," the engines of the "Indianapolis" moving ahead slow, and her helm hard aport (R. pp. 164, 165). When the "Indianapolis" let go the "Kitsap," and she sank, both vessels had turned *half round*, the "Indianapolis" heading away from the docks (R. pp. 169, 170-172), and the "Kitsap" heading in an esaterly direction (R. pp. 171, 172), and when found by the salvors her bow was pointing toward the East Waterway (R. p. 316).

The answer to such a contention on the part of the Appellee is therefore very plain. The "Indianapolis" going ahead with helm hard aport turned herself and the "Kitsap" in a circle southward un-

til the "Kitsap" sank where she was afterwards found. Captain Penfield, in answer to proctor's questions, claimed that the "Indianapolis" would hardly move herself or the "Kitsap" by doing this, and sought to leave the impression that the two vessels swung around as on a pivot. This, of course, could not be true. The "Indianapolis" could not turn herself alone in the water on a pivot, and the "Kitsap," a much lighter vessel, would not offer sufficient resistance laid alongside, to act as a pivot in the water, even with the tide running against them one mile an hour. The court has seen tugs turn barges and vessels and knows that they make a considerable circle, its size depending, of course, on various conditions, such as tide, wind, size of barge or vessel, size of the tug and the speed of her engines, but this resistance of a vessel against a small tug turning her would not be sufficient to make them turn on a pivot, but they would describe a considerable circle.

Captain Penfield claimed the "Indianapolis" would turn as if she was working tied at a dock (R. p. 172), but the court knows that in such case she would not turn at all, but merely hold steady, while in this case she actually turned around; in

fact, she could not go ahead with sufficient speed to turn herself and the "Kitsap" without moving in a circle to starboard, her helm being hard aport. It follows, therefore, that Mr. Evans was correct in his opinion that the vessels did describe a partial circle southward at the end of which the "Kitsap" was let go, and sank at the place where she was afterwards found (R. pp. 381, 382, 397, 398).

Mr. Evans could not give the exact length of the arc of this circle, not knowing exactly the various conditions affecting it, but he gave his opinion that this arc was as shown on Appellant's Exhibit J. We believe this is substantially correct, as shown by all the evidence. But in any event, the "Kitsap" must have been *struck* considerably *north* of the place she was found, and, therefore, north of the proper course of the "Indianapolis," and north of the place the trial court found the point of collision to be. She was not struck south of the point where she was found, because no one claims that the "Indianapolis" was ever south of that line. She could not have been struck at the point where she was found, because if the effect of the "Indianapolis" going ahead pushing against the "Kitsap" was merely to turn her round, the tide in the twenty

minutes between the collision and the sinking of the "Kitsap," running at the rate of one mile an hour, would have carried both vessels one-third of a mile north; therefore, she could not have been struck at this point.

Proctor will undoubtedly refer to the testimony of Captain Hanson and Engineer Hanson to the effect that the speed of the "Kitsap" was increased while she was turning. Captain Hanson testified that he told the engineer to go "a little stronger" because she handled slow (R. p. 50); and Engineer Hanson says he gave the engine five more turns, that is, sixty-five instead of sixty, her full speed being one hundred and eighty turns (R. p. 61). This was before the "Indianapolis" was heard, and certainly it was not then improper to run sixty-five turns instead of sixty, which was only a little over one-third her full turns. But we wish to call the court's attention to this testimony, to show the fairness of these witnesses as compared with the testimony of Captain Penfield. It appears that Engineer Hanson did not remember receiving this order at the time he testified before the government inspectors, but on talking later with the captain he recollected it, and freely testified to the fact before

the commissioner in this case (R. p. 65). If there had been the slightest disposition on the part of these officers to color their evidence or hide anything or be untruthful, the engineer would have convinced the captain that the order was not given, and they would have so testified, instead of the other way.

Proctor will probably argue that the "Kitsap" only acquired the right of way under Article XIX of the Rules of the Road by deliberately turning a half circle in front of the known course of the "Indianapolis." As we have shown, and as appears from the great preponderance of the evidence, the course of the "Kitsap" never at any time crossed or touched the known course of the "Indianapolis." That course in fair weather was to a point about one-quarter of a mile off shore, and south of the south line of the Grand Trunk Dock, and at that point she turned south to go along the angling face of the Colman Dock. The regular course of the "Kitsap" never touched this course, and would not even touch the line of this course projected to shore (Claimant's Exhibit 9). According to all of Appellant's evidence, the course of the "Kitsap" on this occasion did not cross or touch

this course or a projection thereof. However, as the "Indianapolis" was in fact on a course several hundred feet northerly of her regular course, the "Kitsap," when she was at Pier 5 at 4:36, was about in line with that course projected to shore. But the "Indianapolis" was then only three-quarters of a mile from the bell-buoy, and a mile and a quarter from the "Kitsap," too far for either vessel to hear the other. The "Indianapolis" did not hear the "Kitsap" at 4:36 nor until 4:38, after the "Kitsap" must have been on the starboard bow of the "Indianapolis," and the "Kitsap" did not hear the "Indianapolis" until she was in fact on the starboard bow of the "Indianapolis," and then heard her on her own port side. Whether or not the "Indianapolis" knew it was the "Kitsap" which she heard is immaterial, she did not know that a vessel was coming out of the harbor on her starboard bow, and it was her duty, especially in a heavy fog, and as she was off her regular course, to keep out of the way of that vessel. It was certainly no fault of the "Kitsap" to make the turn she did under these circumstances, and after making the turn and hearing the "Indianapolis'" whistles, she was bound, under the rules, to keep her course

and speed until danger was imminent, and had a right to assume the "Indianapolis" would obey the rules and pass astern.

We wish briefly to call the court's attention to the witnesses for the respective parties in this case. Of course, the principal witness for Appellee is Captain Penfield, master of the "Indianapolis." We do not think much need be said about his evidence, as it so clearly appears that he tried in every way in his testimony to shield himself; repeatedly contradicting himself on different points, and contradicting other evidence offered in behalf of Appellee; and also tried to show some fault on the part of the "Kitsap," so that the liability of the "Indianapolis" for damages might be divided. Mate Anderson was also an interested witness, but he knew very little about the facts of the case. It does not appear that there was any look-out on the "Indianapolis," although the cross-libel alleges that fact, anad no other officer or member of the crew of the "Indianapolis," except the engineer in charge, testified in the case. It is certainly remarkable that the quartermaster at the wheel, who knew what signals were given by the captain at his side, and what course was steered, was not called to testify; and

certainly if there had been a look-out on the "Indianapolis," who would have been in a better position to see the action of the "Kitsap" than anyone else on the "Indianapolis," he would have been called as a witness in this case, or his absence explained.

Witnesses Frank Burns, Charles Brydesen, J. E. Gleason and J. R. Tucker, all employees or ex-employees of the Appellant Company, clearly show their bias, and their testimony is so improbable, and against all of the other evidence in the case, that it certainly can have very little weight.

Witness B. F. Jacobs, a Tacoma lawyer, even though he was commodore of the Tacoma Yacht Club, showed remarkable ignorance concerning the speed of the "Indianapolis"; and we think that neither his testimony nor the testimony of the witness Percival will have very much weight with the court, because so clearly against facts in the case testified to by other witnesses on behalf of Appellee. Engineer Thorn merely gave the bells which he received and answered, and his evidence on this point corroborates our claim as to the speed of the "Indianapolis."

As to the evidence of witness Frank Walker, we think the way he tried to avoid answering clear

questions put to him on cross-examination, and his evident bias in the case, and his willingness to give his professional opinion that the "Kitsap" "impaled" herself on the bow of the "Indianapolis," without giving the slightest reason for such opinion, all show that his evidence is entitled to little weight. He admits that he had been doing all the surveying of vessels for the Appellee Company, and we think it appears very clearly from his manner of testifying that he was laboring hard to try to bolster up what he knew was a weak case, in order to help show some fault on the part of the "Kitsap," which might result in a division of damages. We would call the court's attention especially to the evidence of witness H. A. Evans relative to the claim that the "Kitsap" "impaled" herself on the bow of the "Indianapolis" (R. pp. 378-380), although, as stated in the case heretofore quoted from, such a proposition ought not to be advanced before an intelligent court.

The witnesses we have referred to above are the only witnesses who testified in behalf of the Appellee as to any matters concerning the course, speed, handling or fault of the "Kitsap."

Opposed to these witnesses we have the evi-

dence of Captain Hanson, who testified frankly, and who is corroborated in almost every particular by the evidence of the mate, the two look-out men, the engineer and the fireman of the "Kitsap." We also have the engineer, who was fair enough to admit that he was mistaken in his testimony before the Inspectors, and that he did receive an order to go a little faster, and whose evidence as to how the engines were run is fully corroborated by the fireman who was in the engine room with him. We have the testimony of the two look-out men, which is clear, frank, and corroborated by the other evidence; and we have the evidence of the fireman, who corroborates the engineer and other witnesses. Certainly the evidence of these witnesses, instead of being wholly disregarded, as it was by the trial court, is entitled to great weight, not only under the well-settled rules of law heretofore referred to, but also because this evidence is reasonable, consistent, and corroborated by other unimpeached testimony, as well as by circumstances and admitted facts. We cannot understand why the trial court should have disregarded this evidence and based a finding solely upon evidence of witnesses which, under the well-recognized rules of law, is entitled

to little weight, even if it was consistent and probable, but which is in fact inconsistent, vague and improbable, some of it, as we have shown, absolutely impossible, especially when at the same time the Court disregarded the testimony of those same witnesses as to the speed of their own vessel.

Besides these members of the crew, we have the testimony of witnesses absolutely without any interest in the case, and all, so far as their evidence covers the same points, corroborating each other. We have the testimony of witness Foster, a passenger on the "Kitsap;" also of Mr. Jackson, a business man of Seattle; also of Mr. Gilbert, a passenger on the "Indianapolis" who had no interest whatever in the case; also the evidence of Mr. Weld, a man of considerable experience on steam vessels, who was also a passenger on the "Indianapolis," and had no possible interest in the outcome of the case; we have the evidence of Lieutenant Stewart, who stood on the stern of the "Kennedy," and who knew in what direction the sounds of the collision were, and who could not be accused of having the slightest interest or bias in the case. Captain Hill, Harbermaster of Seattle, also testified for Appellant, and we believe his evidence will have great

weight with the court, as he certainly had no interest. The witnesses who stood at the end of Piers 4 and 6, and heard the collision, had no interest in the case, and their testimony was clear, and we believe convincing. The evidence of Captain Wallace, then first mate of the "Reliance," was fair and corroborated by a great deal of the other evidence in the case. Captain Wood of the West Seattle Ferry, corroborated the evidence of Appellant's witnesses as to the density of the fog, and directly contradicted Captain Penfield and Appellee's witnesses that the fog was raising and lowering or in waves. Mr. Shaw, a rancher and a passenger on the "Reliance," had no interest in the case, and his testimony is very positive as to the course of the "Kitsap" and the "Reliance," and where he heard the collision and Captain Hanson's voice.

Of course, it will be argued that the testimony of Mr. Gazzam is biased because of his interest in the suit, but we believe the court will see upon reading his evidence, that he would not testify to a single thing which he did not absolutely know of his own knowledge, never coloring his evidence in the slightest way to help himself, and that he would frankly admit any facts, no matter whether they would help or injure him in this case.

As to the evidence of Lieutenant Commander Evans of the Navy, we feel that it is entitled to exceptional weight in this case. Of course, proctor will claim that he was interested and biased in favor of Appellant. We think a reading of his evidence will show that he had absolutely no bias in the case, and that his sole purpose was to testify to facts as he knew or believed them to be, in answer to the questions which were propounded to him, and without regard to whether they would help or hurt the Appellant in the case. It is true that Mr. Evans had spent a great deal of time in considering this case, that he had heard or read all of the evidence in the case, and that he had made a very careful study of this evidence with a view of being a witness in the case, all of which, of course, was necessary to enable him to testify intelligently, and give his evidence any weight. But we wish to say this, that a man of Mr. Evans' standing in his profession in the Navy of this country is such, that we believe the court will be satisfied that he would not prostitute his professional standing, nor his self-respect by testifying to a single thing or expressing a single opinion that he did not actually know, or after careful consideration conscientiously believe was right.

That no amount of interest, in the outcome of a case, would cause him to color his evidence or express anything but an honest opinion, after the most careful consideration and study, and without regard to the effect it might have upon any issue in the case. He certainly was one of the best qualified witnesses to testify on the lines in which he was interrogated that could possibly have been secured, and his evidence is so clear, and his reasons so sound and so fairly and clearly given that we believe his evidence and opinions will have the greatest weight with the court. We do not believe that anything proctor may say or infer with reference to Mr. Evans' connection with the case will in the slightest degree shake the confidence of the court in the soundness of his opinions, or the correctness of his testimony.

Neither proctor for Appellee nor any witness he produced was able to answer or criticize the testimony given by Mr. Evans. All proctor can do is to criticize Mr. Evans for testifying in the case while he was a Government officer, and to claim that Mr. Evans was biased, because he took Captain Penfield's testimony as to his course and showed where the "Indianapolis" must have been under

that evidence, and the speed she must have run. We do not think the fact that Mr. Evans held a Government position in any way disqualified him from testifying in the case, nor was it improper for him to do so. Mr. Evans was not unfair nor biased in anything he testified to with reference to Captain Penfield's testimony. He did not seek to take any advantage of any mistake on Captain Penfield's part in giving his evidence; and in fact, Captain Penfield did not make a mistake until he tried to correct his evidence, after he saw its effect, by claiming the deviation of his compass was just enough to make the course *what he wanted it to be* at this particular time; but the same deviation would throw him far south of his berth at other times, so that his first testimony is shown to have been correct, and corroborates the testimony in behalf of the Appellant as to where the "Indianapolis" actually collided with the "Kitsap."

Certainly, with the burden on the "Indianapolis" to show that she was not negligent *in running into* the "Kitsap," when she had had her on her starboard for sufficient time to have stopped or kept out of the way, we do not think that the evidence offered by the Appellee will satisfy the court

that Appellee sustained that burden; and we think the court will be satisfied that there was no negligence on the part of the "Kitsap."

Proctor for Appellee brought out on cross-examination of the master and mate of the "Kitsap," that the "Kitsap" had left Pier 4 at about 4 o'clock on the afternoon of the day in question, on her regular run, and had run into and sunk a launch, and a life was lost, shortly after leaving the dock, after which she returned to the dock, and it was on her leaving the second time that she was run into by the "Indianapolis." The avowed purpose of this was to try to show that Captain Hanson was excited or nervous on leaving this second time, and that he did not know what he was doing; but of course, the real purpose was to raise a prejudice against the "Kitsap" on account of this former accident. However, the evidence disproves any claim that Captain Hanson was nervous or excited, or that he did not know what he was doing because of the first accident. He testified that the launch ran across his bow in the fog, and he hit her (R. pp. 41, 42), and of course, there is no evidence in this case to the contrary, nor any evidence of negligence on the part of the "Kitsap" in the first collision. It goes

without saying that the Court will not consider the first accident as having any bearing on the questions at issue here, and there is no presumption that it was due to any fault on the part of the "Kitsap."

Captain Hanson testified that he was not nervous on account of the first accident (R. p. 42), and Mr. Gazzam, President of Appellant Company, who saw Captain Hanson on his return to the dock after the first collision, testified that he was not nervous or excited, and that if he had been in an unfit condition to take the "Kitsap" out, he would not have permitted him to do so (R. p. 336). In fact, the first collision made the officers and crew of the "Kitsap" more cautious on going out the second time. Two look-out men were placed on the bow, all passengers were ordered off the forward deck, and the mate took a place just forward of the pilot-house, so that every possible precaution was taken to avoid another accident.

We wish to call the attention of the court to a few propositions of law and authorities which we think will be helpful in passing on the questions heretofore argued. We do not think there is the slightest doubt that the court will find the "Indianapolis" was grossly at fault, nor do we thing proc-

tor for Appellee will very seriously contend the contrary. This being true, and it being conceded that the "Indianapolis" had the "Kitsap" on her starboard bow long enough before the collision to have stopped or cleared her, and that the "Indianapolis" ran into the "Kitsap," while under the rules the "Kitsap" was required to keep her course and speed, unless circumstances required her to violate that rule, the burden was on the "Indianapolis" to show by a preponderance of the evidence that the "Kitsap" was at fault in not violating that rule, or in doing or not doing some act.

"The fault of the Mack being established beyond cavil she is not entitled to divide damages with the Rome upon criticism of her management except upon clear proof of some fault not made in *extremis*, and reasonable doubts should be resolved in her favor. *The Atlantic*, 119 Fed. 568, 56 C. C. A. 134; *The New York*, 147 U. S. 72."

Lake Erie Transp. Co. vs. Gilchrist T. Co., 142 Fed. (C. C. A. 6th) 89.

"When the fault, primarily, is on the part of the vessel required to keep out of the way, the other having the right of way will not be held in fault except on a preponderance of proof that she did not take reasonable measures to avoid collision as soon as she had reason to apprehend danger."

Spencer on Marine Collisions, Sec. 66 and cases.

In connection with the consideration of the question as to the fault of the "Indianapolis," we call the Court's attention to the following authorities:

"The rule adopted by some maritime courts is, that a steamship should always be under such control that it can be stopped, and its direction of speed reversed, within the distance at which an approaching vessel can be seen."

Spencer on Marine Collisions, Sec. 44, citing *The Saale*, 63 Fed. 478;

McCabe vs. Old Dominion S. S. Co., 31 Fed. 234;

The Bolivia, 49 Fed. 169.

"Keeping a powerful steamer at full speed through an obscured atmosphere is negligence *per se*. The law imposes upon very vessel the duty of slackening her speed according to the density of the fog and the difficulty of clear vision, even to the lowest point consistent with maintaining steerageway."

Spencer on Marine Collisions, Sec. 44; citing

Clare vs. P. & S. S. Co., 20 Fed. 535.

Cunard S. S. Co. vs. Fabre, 53 Fed. 288.

The Pennsylvania, 4 Ben. 257.

"The criterion of moderate speed in all cases is the ability of the ship to stop immediately in the presence of danger."

Do.

The Leland, 19 Fed. 771.

The Alliance, 39 Fed. 476.

The City of New York, 147 U. S. 72.

"A greater degree of vigilance is required of a ship navigating the waters of a harbor in foggy or thick weather, where the passage of vessels is of frequent occurrence than on the high seas, where the liability of meeting others is less. A vessel has no right to run in a dense fog near piers, docks and anchorage grounds, where vessels usually tie up or are moored, except at the slowest rate of speed possible, consistent with steerage-way, and with a due observance of every other precaution that can be invoked to guard against collision."

Do. Sec. 49, citing

The St. John, 29 Fed. 221.

The Howard, 30 Fed. 280.

The Demorest, 25 Fed. 921.

"The starboard hand rule operates on both vessels. The one is to get out of the way by a change of course, or stopping or reversing. The other is to keep her course and speed."

The Elizabeth, 197 Fed. 160, 162.

We would also call the court's attention to its decision in the case of *The Belgian King,* 125 Fed. 869.

The only evidence introduced by Appellee, as

directly tending to show the speed of the "Kitsap" at the time of the collision, was the evidence of the master and mate of the "Indianapolis," and of the witnesses Jacobs and Percival. The rules already referred to as to the weight to be given evidence of persons on one boat concerning the speed of an approaching boat, apply to all of these witnesses; and the well-known rules applying to the testimony of interested witnesses, apply to the testimony of the two officers of the "Indianapolis." It clearly appears that the witnesses Jacobs and Percival were mistaken about the speed at which the "Indianapolis" was run from the bell-buoy to the point of collision, and being mistaken in this material fact, of course, doubt is thrown upon their testimony as to the speed of the "Kitsap."

"When witnesses directly contradict each other upon a main point in issue, greater weight should be given, other things being equal, to the testimony of those whose statements on other material points have not been proved incorrect, than to the testimony of those who have made mistakes. Where a witness testifies to an event consisting of several incidents, for instance, an outside observer testifying concerning a collision between two vessels, and it appears that he is mistaken in some particulars, even though of no great moment in themselves, it indicates that he was not so clear and accurate an observer as to justify giving his version of the occurrence higher credit than that of another witness of equal oppor-

tunity for observation who is not convicted of errors."

Moore on Facts, Sec. 1088.

In connection with the testimony of witness H. A. Evans, for Appellant, and Frank Walker, for Appellee, as to their opinion of the speed of the two vessels drawn from an examination of the cut in the "Kitsap," we call the court's attention to the language in a British Columbia case decided by Sir Matthew B. Begbie, L. J. A., as follows:

"It can be mathematically proved that the theory of the Cutch as to the conditions of the actual collision is entirely baseless. It would be mathematically impossible that the Joan, throwing herself at the rate of ten knots per hour across the bow of the Cutch, a nearly stationary ship, as the defendants' witnesses would appear to suggest, could cause the injuries described and not disputed, viz., a deep cleft nearly perpendicular to her beam. If the injuries were occasioned as the defendants contend, the rent would extend in a direction from the stem of the Joan toward her stern, and would be mainly external, without much penetration. But if two vessels of nearly equal size and speed, of equal momentum, collide at an angle of about 45°, the injury will extend inwards into the vessel that receives the shock, in a direction nearly perpendicular to her beam. This will be apparent on drawing the necessary diagram so as to show the resultant thrust; the impetus of the recipient vessel being exactly represented by an equivalent thrust in the direction opposite to her motion. That is to say, the injury

inflicted, and shown to have been suffered by the Joan, is exactly explained by the plaintiffs' account of the position and speed of the vessels, though their witnesses did not seem to understand that; and is quite irreconcilable with the circumstances suggested by the defendants."

The Catch, 8 *British Columbia*, 357, 361; 3 Can. Exch. 362, 368.

Appellant claims that, contrary to her usual course and custom, on the trip in question, the "Kitsap" ran at a high rate of speed down the face of the docks, far out of her course, in this dense fog, without showing any reason why she should have done so. To do this, of course, would be manifestly running a great risk of losing the vessel and possibly the lives of those aboard. It is a well settled principle of law that the presumption is that persons will not run unnecessary hazards or risks, and we think the following observations of *Moore on Facts*, and the cases cited by him, are pertinent to a consideration of this claim of Appellee.

"There is always a presumption of more or less weight that those in charge of a vessel will not subject their lives to hazard by neglecting to maintain a vigilant watch, especially in a state of the weather, such as wind, rain and darkness, which makes navigation difficult. * * *

In a collision case between vessels the suggestion that the smaller and weaker steamer sought the collision was not entertained, since it was inconsistent with the strongest motives which usually govern human actions. * * *

The presumption that men will not carelessly expose themselves to peril aids circumstantial evidence of the degree of daylight at the time of a collision between vessels."

Moore on Facts, Sec. 559.

"The danger and injury to both vessels is so great in almost every case, one or both not unseldom going down with all on board, that the strongest motives exist with all to use care and skill to avoid collisions. The want of them, therefore, is never to be presumed, but is required to be clearly proved. To presume otherwise would be to presume men will endanger their own lives and property, as well as those of others, without any motive of gain or ill will."

Waring vs. Clarke, 5 Howard (U. S.), 441, 501.

In this case, the presumption as to the "Indianapolis" has been fully overcome by the admissions of Captain Penfield and Engineer Thorn that the vessel did run for five minutes, through the fog, toward the docks, at her full speed; and by the fur-

ther fact that during the succeeding two minutes before the collision she must have continued at practically this speed in order to have reached the point of collision. But the presumption prevails in favor of the "Kitsap," as against the testimony of the four witnesses for Appellee who claim to have stood on the end of the Colman Dock, and to have seen the "Kitsap" racing full speed past that dock, out of her course, in the dense fog, without any known purpose or motive and against the positive testimony of a large number of witnesses.

It will be noticed that neither the master's log nor the engine room log of the "Indianapolis" was produced at the hearing in this case. Of course, the logs of the "Kitsap" could not be produced, as she was sunk within a few minutes after being struck. It will also be remembered that neither the quartermaster, who, Captain Penfield testified, was at the wheel of the "Indianapolis," nor any look-out on the "Indianapolis," if there was one, as alleged in the cross-libel, were offered as witnesses in the case, nor was their absence explained. It appeared (R. p. 294) that the engine room log was, at the time Engineer Thorn testified, with the United States Inspectors, but no reason was given why it was not ob-

tained and offered in evidence, nor any reason given why the captain's log was not offered. It is a well-known rule of law that the non-production of material evidence raises a presumption that it would be unfavorable if produced.

"Where the evidence tends to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed and to rebut the inferences which the proof tends to establish, and he neglects or refuses to offer such proof, the natural inference is that the proof, if produced, instead of rebutting, would support the inference against him. * * *

Where the burden of proving a defense in a collision case was cast upon the respondent, the neglect of the latter to produce some of its seamen who had deserted, but who by reasonable diligence, the court thought, could have been found, was 'open to remark.'"

Moore on Facts, Sec. 564.

"Where the credibility of a witness is put in doubt, but his testimony is susceptible of corroboration, the court will probably take notice if no effort is made to substantiate his statement. * * * A party can hardly hope to overcome a strong presumption by force of his own testimony alone if he fails to produce available witnesses to corroborate him. * * *

Failure of a ship against which the evidence is strong in a collision case, to produce all of her officers and crew as witnesses, necessarily puts her claim at a disadvantage."

Moore on Facts, Sec. 566.

DAMAGES.

The damages sustained by the "Kitsap" are easy to be determined under the ~~said~~ settled rules of law applicable thereto, as Appellee did not introduce any testimony to contradict the evidence of Appellant as to these items.

"It is the general rule in collision cases that the measure of damages is the actual loss suffered."

The Columbia, 109 Fed. 660 (C. C. A. 9th Circuit); also

Societe, etc., vs. O. R. & N. Co., 178 Fed. 324.

"The measure of damages in case of a partial loss is the amount necessarily incurred in repairing the vessel and in restoring it to a condition as good as it was before the collision, with interest on the amount so expended, together with the damages incurred by reason of the loss of the services of the vessel from the time of its disability until again restored to a seaworthy condition, together with such disbursements and expenses as directly result from the collision and are incurred *on behalf of the injured ship* in restoring it to the condition in which it was prior to the injury inflicted. * * *

Restitution for the loss sustained and no more is the rule for determining the amount of damages in case of partial loss." (Italics ours.)

Spencer on Marine Collisions, Sec. 197.

The damages claimed by Appellant are as follows (R. p. 433):

Expense for salvage	$12,712.20
Expense for repairs	12,313.00
Depreciation for damage to boiler by submersion	1,500.00
Expense for survey	25.00
Expense for superintendence o....f repairs	566.67
Demurrage for 139 days at $103.00 per day	14,317.00
Value of stores destroyed	100.00
Total	$41,533.87

Appellee does not question the item as to cost of repairs, and proctor expressly stated that he would not dispute Appellant's evidence as to their reasonableness (R. p. 135). The amount allowed by the trial court is $12,313.00, which is the amount claimed by Appellant.

The item of $25.00 for survey of the "Kitsap" was allowed by the trial court and was proper.

The Switzerland, 67 Fed. 617.

The Alaska, 44 Fed. 498.

The item of $566.67 for expense for superin-

tendence of repairs claimed by Appellant and allowed by the court, was proper and is not contested.

New Haven S. B. Co. vs. The Mayor, etc., 36 Fed. 716.

The value of stores destroyed was agreed to be $100.00, which was allowed (R. p. 141).

The items of the "Kitsap's" damage which are in dispute here are the expense for salvage, $12,712.20, which was allowed by the trial court; the item of $1,500.00 for depreciation in the boiler by reason of being submerged, which was disallowed by the trial court; and the amount of demurrage, which the trial court allowed at $50.00 per day instead of $103.00 per day, as claimed by Appellant. We will discuss these items in their order.

Salvage. Appellee assigns as error the allowance by the trial court of the item of $12,712.20 for salvage of the "Kitsap." The evidence shows that the "Kitsap" was sunk in about 240 feet of water, and it is alleged in the libel that she was a total loss. However, by the time of the trial it appeared that she had been raised and was afterwards repaired, so that damages as for a partial loss, including the cost of raising and repairing her and demurrage, were allowable instead of her value.

Appellnt called S. B. Gibbs as a witness in its behalf, who testified that he was agent and surveyor for the San Francisco Board of Marine Underwriters, residing at Seattle; that he "represented the underwriters in the matter of the collision between the 'Kitsap' and the 'Indianapolis'" (R. p. 108); that he was the representative "of the underwriters of the 'Kitsap'" (R. p. 113); that after the collision, on behalf of the underwriters, he made a contract for the salvage of the steamer, which contract was offered and received in evidence as Libelant's Exhibit C. The contract is an agreement between the Elliott Bay Dry Dock Company and S. B. Giggs, "agent for the underwriters of the S. S. 'Kitsap,'" by which the Dry Dock Company undertook to raise and deliver the "Kitsap" for sixty per cent of her value when delivered, if the vessel when raised could be repaired, the repaired value being agreed to be $35,000.00, which was her value for insurance purposes (R. p. 124); or if she could not be repaired at a cost less than this repaired value, then sixty per cent of whatever amount was realized from the wreck, by sale, break-up or otherwise. Appellant, as owner of the vessel, consented that the underwriters might enter into this contract without

prejudice to the rights of either party under the policies of insurance on her.

Captain Gibbs also testified that, in his opinion, this contract was a fair and reasonable contract for the raising of the vessel, in the condition in which she was found (R. p. 109), and there is no evidence to the contrary. He testified that after the vessel was raised a survey was had to determine what repairs were necessary to the vessel; that bids were called for, and a bid of $12,313.00 for such repairs accepted, which he stated was the lowest bid, and in his opinion a reasonable one (R. p. 110).

Appellant claimed an item of $1,500.00 damage to the boilers of the "Kitsap" by submersion, which could not be and was not repaired. This amount, added to the $12,313.00 cost of repairs actually made, or $14,813.00, deducted from the agreed valuation of $35,000.00, was the salved value of the vessel, of which the salvors were entitled to sixty per cent, or $12,712.20, the amount of salvage claimed by Appellant and allowed by the trial court. Captain Gibbs testified that, although this amount had not been paid at the time he gave his evidence, the underwriters had obligated themselves to make the pay-

ment, and, of course, the ship was liable for such amount.

Appellee did not offer any evidence to contradict this testimony, nor to show that the cost of salvage was not reasonable; but it argued in the court below, and will probably argue here, that Appellant did not show itself to have suffered anything by reason of the salvage operations, as distinguished from the repair bill, because it neither contracted to nor did it pay out anything for salvage; that certain persons claiming to have been underwriters entered into the salvage contract, but that they are not parties to this case; and, while if they were underwriters, they might under their policies be subrogated to Appellant's rights, these facts are not shown, and that no party to the record in this case is entitled to this item. However, the trial court allowed this item and we think correctly. As shown by the authorities above quoted, the damage for which the "Indianapolis" and her stipulators were liable, if at all, is the expense of restoring the vessel to a condition as good as it was before the collision, which included all expenses and disbursements directly resulting from the collision, and which were "incurred on behalf of the injured ship." We think

the amount Appellant, as owner of the ship, is entitled to recover is the amount of damage sustained by the ship, which amount, in the absence of evidence to the contrary, is presumably the amount paid to restore her to the condition in which she was before the collision, besides demurrage for loss of her use. We do not think it makes any difference whether Appellant actually paid out any of these amounts, or whether they were all covered by insurance, or whether some one voluntarily raised, repaired and restored the vessel to Appellant without any cost to it. To hold otherwise would be to hold that a person or vessel causing damage to another would have the benefit of any insurance on the vessel, or any gift which might be made to the owner of the vessel in connection with repairing the damage caused by the offending vessel.

It would not be contended that if Appellant had made the contract for salvage itself, instead of the underwriters on the "Kitsap," that the item should not be allowed. Nor if the vessel had been sold under the salvage contract, Appellee would not contend that Appellant could not recover its loss on that account. If Appellant had itself paid the amount called for by the salvage contract, Appellee would

hardly contend that Appellant could not recover the same. If volunteers had salved the vessel, and Appellant had been compelled to pay the amount in question, in order to regain her, Appellee would admit that Appellant could recover this amount; and certainly if, instead of Appellant actually making this payment itself in the first instance, the underwriters under their insurance contract, either paid this amount to volunteer salvors, or to salvors under the salvage contract, and then deducted this amount from the insurance due Appellant, or left this matter for adjustment under the policies of insurance, Appellee and the "Indianapolis" could not be relieved from a payment of this amount to Appellant as owner. We do not think it makes any difference whether the obligation for salvage, or its payment, was incurred or made in the first instance by the insurers of the "Kitsap," and then adjusted between the owner and the insurers, or whether the same was incurred or paid in the first instance by the owner, and then adjusted between it and the insurer. To hold in this case that the Appellant cannot recover this item of salvage, which it is admitted was necessary and reasonable, and the result of the collision, is to hold that in a collision case an owner cannot

permit his underwriters to salve the ship, as they have a right to do, under penalty of losing the cost of salvage, which he could collect if he salved the ship at his own expense in the first instance, and then collected the same, or such part thereof as he might be entitled to from the underwriters. There is certainly no law to sustain such a contention as to this item. On the other hand, the law is well settled that it is no defense to an action for damages for collision that the injured party has received insurance for the damage incurred.

"It is no defense to an action for damages for collision that the injured party has received insurance for the damages incurred. The party at fault may not shield himself by showing satisfaction for the damages received through payment by another. The insured in such cases may recover as fully as though no insurance had been received. The insurer, however, has the right to claim whatever damages are recovered, the insured being his trustee for an amount equal to the insurance paid. The insurer may, if he sees fit, maintain an action in his own name against the vessel at fault."

Spencer on Marine Collisions, Sec. 207.

Whether or not the underwriters had a right of subrogation for the amount of salvage, if any, they paid in this case, makes no difference, because, as stated by Spencer in the last quotation, it is optional

with the underwriter whether he will claim a subrogation for the amount he has paid, or whether he will permit the owner to recover the entire damage, and hold him a trustee for the amount the underwriter has paid out under the policy of insurance.

In the case of *Fretz vs. Bull*, 12 Howard (U. S.) 466, the Supreme Court of the United States squarely held that the owner of a boat and cargo destroyed by a collision might maintain an action for the entire loss, even though he had received from the underwriters a part of such loss. In that case, the action was commenced by the owner for the use of the underwriter, and the court held that it was not a substantial objection that it was so brought; but, of course, it was not necessary to state in the action that it was for the use of the underwriter, because that might or might not be true, according to the terms of the insurance contract, which had nothing to do with the liability of defendant. It was no concern of the vessel at fault who was entitled to the money as between the owner and underwriter, and it certainly could not escape liability because the underwriter had paid the owner a portion of his loss. Of course, a recovery by the owner would be a bar to an action by the underwriter against the

offending vessel, and this is all that the offender is interested in, so far as this question is concerned.

The Supreme Court of the United States in the case of *The Patomac*, 105 U. S., 630, 634, said:

"The mere payment of a loss by the insurer does not indeed afford any defence, in whole or in part, to a person, whose fault has been the cause of the loss, in a suit brought against the latter by the assured."

In that case it appeared that by the express terms of the policies of insurance, the insurers, upon the payment of the loss, were entitled to demand from the insured either an assignment of his right to recover damages against the offending ship for the loss so paid for, or to bring suit for such damages in his name, and to hold for their own use such proportion of those damages as the amount insured bore to the valuation of the insured vessel; and in that case, the underwriters had released the offender to the extent of the underwriters' interest in the damage recoverable. Under those circumstances, and in view of those facts, the court held that the insured could not recover the portion of damages which it appeared belonged to the underwriters, and *which they had released.*

Of course, in this case, no such facts appear, nor does it appear what the respective rights of the underwriters and the owners are as between themselves. Under the rule laid down in these authorities, Appellant has a right to recover the entire damage to the ship, which admittedly included this item of salvage.

"The underwriters upon a ship, A, sunk by a collision with B, cannot sue B or her owners in their own names. Their only right of action is by subrogation to the rights of the owners of A; and they must sue in the names of the owners of A."

Marsden's Collisions at Sea, Sixth Edition, p. 98.

"If the assured, after receiving the amount of his loss from his insurers, recovers damages from the wrong-doer in the collision, he is a trustee of such damages for the underwriter. But the fact that the plaintiff in a collision action has been compensated for his loss by his insurers is no answer to his claim for damages against the wrong-doer."

Do. pp. 277-278.

It makes no difference in this case whether the underwriters incurred the obligation for salvage themselves, or even paid the amount due for salvage direct to the salvors, or whether they required or permitted Appellant to incur such obligation or pay such salvage, and then reimbursed Appellant therefor. We think the authorities are conclusive in this question.

DAMAGE TO BOILER.

One of the items of damage to the "Kitsap" claimed by Appellant, was $1500.00 for depreciation of her boilers due to their submersion. The evidence shows that after the "Kitsap" was raised, a survey was made by Captain S. B. Gibbs and Mr. T. W. C. Spencer (R. pp. 109, 134), for the purpose of ascertaining the damages caused by the collision and by submersion (R. p. 110). An agreement had been entered into between the salvor, the underwriters and the Appellant, that in case of any dispute arising on the survey, such dispute should be submitted to an umpire, whose decision should be binding. Pursuant to this agreement the question was submitted to Mr. H. A. Evans, as umpire, as to whether or not the boilers had been damaged by submersion after the collision, which damage could not be repaired. Mr. Evans made an award of $1500.00 for such damage (R. pp. 113, 125, 126).

Appellee did not offer any evidence that the boilers were not damaged by the submersion, nor that the allowance was not a reasonable one; and this damage was not repaired. Appellant took the vessel, after she was raised and repaired, with her boilers depreciated in this amount, under the uncontradicted

evidence; and as Appellee was liable for whatever damage the "Kitsap" sustained because of the collision, it seems to us clear and proper, under the evidence, that this item should be allowed. Certainly, if it was not a proper item to allow against the Appellee, it was not proper to charge the salvor with its sixty per cent of the item, and the salvage item allowed in this case should have been increased $900.00. Because by disallowing the $1500.00 item the cost of repairs would be only $12,313.00 for those actually made, which, deducted from $35,000.00, leaves $22,687.00, of which the salvor would be entitled to sixty per cent or $13,612.20, instead of $12,712.20 allowed by the trial court. As the judgment stands, Appellant not only is compelled to take its vessel depreciated $1500.00 in value after repairs made, but should pay the salvor $900.00 more than the court allowed it. The facts all appear in the record here, and we think the court should either allow the item in full as claimed, or increase the salvage award $900.00.

DEMURRAGE.

It is, of course, conceded that Appellant, if entitled to recover at all, is entitled to demurrage for loss of use of the "Kitsap" from the time of the collision until she was repaired. There is no dispute that this time was from December 1, 1910, to and including sixty working days from February 18, 1911, which would be May 2, 1911, making one hundred and thirty-nine days (R. p. 111).

The "Kitsap" was being operated by Appellant upon a regular daily run, which Appellant had had established for about six years, and upon which it had a contract to carry the mail (R. pp. 135, 136), for four years from July 1, 1910. It had a right, and was bound to keep a vessel on this run, both to perform its mail contract, and so as not to lose its established business. To do this, it was necessary to place some other vessel on the run while the "Kitsap" was being raised and repaired. It did place the "Hyak," another of its vessels, of like character and type of the "Kitsap," on the run (R. pp. 136, 138). It was stipulated that the charter value of the "Hyak" was $175.00 per day (R. p. 297), and the evidence showed that the cost of her operation was $72.00 per day, leaving a net charter value of $103.00

per day (R. pp. 127, 138) for the "Hyak." It was further stipulated that the net earnings on the run during this period, if a material way to determine the amount of demurrage, were $50.00 per day. The trial court allowed Appellant demurrage at the rate of $50.00 per day only, for the 139 days it lost the use of the "Kitsap," and Appellant assigns as error, the refusal of the trial court to allow the net charter value of the "Hyak," or $103.00 per day, for this period. The undisputed evidence is that the net charter value of the "Kitsap" would be a little more than that of the "Hyak," because of cheaper operation (R. p. 138).

It is true that the "Hyak" belonged to Appellant, and that at the time she took the "Kitsap's" run she had no charter or regular run. But we submit that this fact is immaterial. She might have had such a charter at any time, as she had had the year before (R. pp. 138-10), and by using her in place of the "Kitsap" Appellant lost any chance of such a charter. Certainly if Appellant had not had a spare boat fit for this run, it could have chartered such a boat and recovered her cost as demurrage. We cannot see why a different rule should apply, merely because it used its own vessel, thereby losing her use

otherwise. If Appellant had chartered the "Hyak" from some one else, it could have recovered the net cost of such charter; and there is no reason why Appellee should have the benefit of Appellant's investment in this substituted vessel, which the undisputed testimony shows was of the value of $50,000.00 (R. p. 125). To allow Appellant $103.00 per day demurrage for use of the "Hyak" is only to allow what it would have had to pay if it had not this investment in the "Hyak," but had been obliged to charter from others. It would in no sense be adding to Appellant's profits, but merely making it whole for the loss of the use of the "Kitsap."

To show that we are correct in this contention, let us look at the matter in another way. Appellant was entitled to be *made whole*, nothing less, nothing more. If the "Kitsap" had not been lost, it would have had that vessel to keep the run in question, and would also have had the "Hyak" open for charter, with a net charter value of $103.00 per day. By the loss of the "Kitsap," and placing the "Hyak" on her run, Appellant lost the use of, or chance to use the "Hyak" otherwise, which was a loss to it of her net charter value. Appellant could not be made whole

unless it recovered that value and maintained the "Kitsap's" run.

"The fact that another vessel belonging to the same owner was used as a substitute for the disabled steamer during the time of her detention, should not militate against the right to compensation, nor afford just cause for awarding less than would be allowed if the owner from lack of enterprise, or inability, failed to have an available substitute for use in such an emergency."

State of California, 54 Fed. 404, 407.

In the above case, there was no evidence as to the charter value of the vessel damaged, that this court determined the demurrage from the only evidence in the case, to-wit: daily earnings. But the rule we contend for is recognized in that case, which is supported, and the reasons therefor stated, in this and the following authorities.

The owners substituted another of their boats for the injured boat. Held that they had a right to do this, and "are entitled, therefore, to charge for the use of their own boat at the market value of its use, for the time being, precisely as if they had hired her from other owners." Demurrage to the amount of the value of the use of the substitute boat was allowed.

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"The true measure of loss from detention under the circumstances here shown, is the cost of substitution. When furnished a suitable vessel to take the place and do the work of the other, her owners are fully compensated, in this respect. The cost of such substitute accurately measures the market value of the other's services. The value of her charters may not; other considerations enter into this. * * * The cost of a proper substitute is therefore the measure of loss for detention, wherever its application is practicable."

The Emma Kate Ross, 50 Fed. 545 (C. C. A. 3rd Cir.).

"The best evidence of damage suffered by detention is the sum for which vessels of the same size and class can be chartered in the market."

The Conqueror, 166 U. S. 100; also

The North Star, 140 Fed. 263;

The "Potomac," 105 U. S. 630;

The Columbia, 109 Fed. 660;

Societe etc. vs. O. R. & N. Co., 178 Fed. 324.

Under these authorities, and the undisputed evidence and stipulations, we respectfully submit that the trial court erred in not allowing Appellant demurrage at the rate of $103.00 per day for 139 days, or $14,317.00.

INTEREST.

Appellant assigns as error the failure of the trial court to allow it any interest on the amounts which were found it was entitled to.

"In computing the amount of damages to be allowed the party entitled to recovery, it is proper to allow interest on the amount expended for repairs and on the amount of demurrage charges that the prevailing party is entitled to, from the date when the various items of expense were incurred, and from the last day of detention, where demurrage is recovered."

Spencer on Marine Collisions, Sec. 206.

While it has been stated that the allowance of interest is largely in the discretion of the court, we think this rule does not apply in a case like this, especially if, as we have contended, the "Kitsap" was without fault.

The State of California, supra.

The salvage was due on February 18, 1911, when the contract for repairs was let (R. p. 111), so the amount of salvage could be determined, and we think interest on the item of salvage should have been allowed from that date.

The cost of repairs was due May 2, 1911, when

the vessel was to be turned over to Appellant under the repair contract, and demurrage was also due on that date; we think interest should have been allowed on these items from that date. The other items of damage, to-wit: $1500.00 for depreciation to boilers, $25.00 paid for survey (R. p. 133), $566.67 expense of superintendence, and $100.00 for loss of stores were all due on that date, and we think interest should be allowed on these items also from that time. Under the decision of the trial court, which was made more than one year after all these expenses, aggregating $41,533.87, or $32,666.67 allowed by the court, had been incurred by Appellant, it lost interest on this large sum, and penalized that much more than Appellee, whose damage was small. We feel that in law and good conscience, Appellant is entitled to interest as claimed.

COSTS.

Appellant assigns as error, the refusal of the trial court to allow its costs in the lower court.. Of course, if Appellant is correct in its contention that the "Kitsap" was not at fault, and Appellant should have recovered its full damages, instead of having the damages divided, costs in the lower court should be awarded to it.

In conclusion, we wish to say that we have extended our argument to considerable length, because we feel the importance of the case justifies it, and a proper understanding of the questions involved requires it; and we respectfully ask this court to give the evidence the careful consideration we feel is required in order to understand and determine the facts of the case. We think the memorandum decision of the trial judge shows that he did not understand the facts of the case. The case was argued the first part of November, 1911, but was not decided until May 28, 1912. Necessarily the court had forgotten much of the argument made ~~eight~~ seven months before. All of the evidence was taken before the Commissioner and reported to the trial court, who, therefore, had only the type-written testimony before him, and did not see any of the witnesses. The Commissioner did not

make any findings in the case. The trial judge was therefore in no better position to pass upon the facts than this court is. It is well settled that in such cases, in admiralty, this court does not in any way feel bound by the decision of the lower court, but, being in as good a position to pass upon the facts, will decide the case as though it had come before it in the first instance.

> *The Santa Rita*, 176 Fed. 890 (C. C. A. 9th Cir.).

It is a fact well known to this court, that the trial judge, who heard and decided this case below, practically all the time after the case was submitted to him, had the work of two judges to carry. The record in the case is very long, and much of the testimony relates to matters occurring within a short space of time; and the question of fault of either vessel depends to a considerable degree upon careful consideration and comparison of the testimony of different witnesses, the plotting and measurement of courses, and calculation of speed, the measurement of angles of cut, and the consideration of other like evidence, which requires considerable labor and study.

We have tried to assist the court in these matters by our testimony, especially that of witness H. A.

Evans, an expert of exceptional ability, to whose testimony we respectfully ask that especial attention be given.

We feel that the memorandum decision of the trial judge shows that he did not give the time to the consideration of the evidence which was necessary to fully understand it; otherwise he could not have made a finding that the "Kitsap" turned "around on her regular course," and at the same time find the point of collision to be more than one hundred feet away from the nearest point to that regular course, as shown by Appellee on its own Exhibit 9. Nor do we think he could have found the "Kitsap" was travelling at a "high rate of speed," if she was on her regular course. Nor could he have disregarded the testimony of the witnesses on the "Indianapolis" as to her own speed, and based a finding as to the "Kitsap's" speed on their evidence alone, as he must have done if the "Kitsap" turned on her regular course, which would not be in sight in the fog of the four witnesses on the end of the Colman Dock. Nor would he have disregarded the testimony of those on the "Kitsap" as to her speed, but believed their testimony as to the speed of the "Indianapolis." Nor would he have believed the testimony

of Appellant's witnesses as to the course of the "Kitsap," and disbelieved it as to her speed and the point of collision. Nor would he have disregarded the mathematical calculations of Mr. Evans as to the speed of the "Kitsap" upon her regular course, when he found the time of the "Kitsap's" departure and the collision to be as Appellant claimed and as was not disputed, and the same time upon which Mr. Evans' calculations were based. All of which could be easily verified by a little calculation based upon exhibits offered by either party.

For these reasons, and the importance of the case, we have extended our argument, and attempted to point out the evidence and where it is found in the record, to sustain our contentions, to assist the court in finding and understanding the evidence. We firmly believe that after this court has read and considered all the evidence in the case, it will be fully satisfied that the "Indianapolis" was guilty of gross negligence, and that the trial court was in error in finding any fault on the part of the "Kitsap." In that event, we will be entitled to a reversal, and a decree for full damages to the "Kitsap," with interest and costs in both courts. We also think that our contentions as to the damages Appellant is entitled to

recover, will be found sustained by the law and the evidence.

We respectfully submit that the decree of the lower court should be reversed, and a decree entered for Appellant's full damages as claimed, with interest and costs.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant and Cross-Appellee.